FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OCTOBER 1986
Volume 8
No. 10

DECISIONS

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

OCTOBER 1986

The following case was granted for review during the month of October:

Martha Perando v. Mettiki Coal Corporation, Docket No. YORK 85-12-D. (Judge Melick, September 9, 1986)

Secretary of Labor, MSHA v. Fife Rock Products Co., Inc., Docket No. WEST 85-141-M. (Judge Morris, Default Decision, September 15, 1986)

Review was denied in the following case during the month of October:

Secretary of Labor on behalf of Ronnie Beavers, etc. v. Kitt Energy Corporation , Docket No. WEVA 85-73-D. (Judge Maurer, September 10, 1 decision pending final order. Petition was ruled premature).

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 14, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 85-141-M
FIFE ROCK PRODUCTS COMPANY, INCORPORATED	:	

BEFORE: Ford, Chairman; Doyle and Lastowka, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Administrative Law Judge John J. Morris issued a decision on September 15, 1986, finding Fife Rock Products Co., Inc. ("Fife") in default, affirming a citation issued for an alleged violation of 30 C.F.R. § 56.5-7 (1984), and assessing a civil penalty of $600. After the judge's decision was issued, Fife filed with the judge a request that the decision be stayed and the matter be reheard. We deem Fife's request to constitute a petition for discretionary review which we hereby grant. For the reasons that follow, we vacate the judge's decision, and remand for further proceedings.

The case commenced when the Secretary of Labor filed a Proposal for Penalty proposing that Fife be assessed a civil penalty of $600 for an alleged violation of section 56.5-7. The matter was assigned to Judge Morris. After unsuccessful settlement negotiations between the Secretary and Fife, the judge issued a Notice of Hearing on June 2, 1986, setting a hearing for August 12, 1986, in Salt Lake City, Utah. When Fife did not attend the hearing, the judge orally found Fife in default and assessed a penalty of $600 for the violation. In his written decision of September 15, 1986, the judge confirmed his entry of default and his penalty assessment. Subsequently, on September 22, 1986, Clifford P. Woodward, Fife's General Manager, sent to Judge Morris a letter that stated in part: "Having received a copy of your 'Decision and Order' dated September 15, 1986, it is apparent to us that we were not aware of

the hearing set for August 12, 1986." Fife requested that "the decision ... be stayed and that all parties ... be heard through a rehearing of the case." By letter dated September 25, 1986, Judge Morris informed Fife that his jurisdiction had terminated and forwarded Fife's request to the Commission. Fife's letter was received by the Commission's Docket Office on September 29, 1986.

The judge correctly indicated that his jurisdiction in this matter terminated when his decision was issued on September 15, 1986. 29 C.F.R. § 2700.65(c). The Commission has observed repeatedly that default is a harsh remedy and that if a defaulting party can make a showing of adequat or good cause for a failure to respond to an order or notice, the failure may be excused and appropriate proceedings on the merits permitted. See M.M. Sundt Construction Co., 8 FMSHRC __, No. CENT 86-6-M, slip op. at 3. (September 15, 1986), and authorities cited. Fife has alleged that it did not receive the judge's June 23, 1986 notice of hearing and was unaware of the August 12, 1986 hearing. 1/ Fife is also proceeding without benefit of counsel. We conclude that in the interest of justice, Fife should have the opportunity to present its position to the judge. M.M. Sundt, supra, slip op. at 2-3.

1/ The June 2, 1986 notice of hearing claimed not to have been received appears to have been mailed to the parties by regular first class mail. The Commission's procedural rules do not mandate service of a notice of hearing by registered or certified mail, return receipt requested. However, in view of the recent questions raised both here and in M.M. Sundt Construction Co., regarding whether proper service has occurred, the Commission's judges should consider the advisability of serving notices of hearing and orders to show cause issued pursuant to Commission Procedural Rule 63(a), 29 C.F.R. § 2700.63(a), either by registered or certified mail, return receipt requested, or by both regular first class mail and registered or certified mail, return receipt requested.

Accordingly, the judge's decision is vacated and this matter is remanded for further proceedings consistent with this order. 2/

Ford B. Ford, Chairman

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission in this matter. Further, Fife is reminded to serve the Secretary with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 1, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-162 A.C. No. 36-00840-03579
v.	:	
BETH ENERGY MINES, INC., Respondent	:	Cambria Slope Mine 33

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the one violation involved in this case. The originally assessed penalty was $259. The proposed settlement is for $125.

The Solicitor's motion discusses the violation in light of the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Order No. 2688594 was issued for violation of 30 C.F.R. § 75.303(a) because the No. 1 Bleeder Room had not been examined within three hours before the start of a shift, as required by the operator's ventilation plan. The Solicitor represents that a reduction in the proposed penalty is justified because both gravity and negligence were less than was originally thought. The ventilation plan required that all active workings and all adjacent places receive preshift examinations. The Solicitor maintains that the No. 1 Bleeder Room was an "adjacent place," while the operator maintains it was not. However, the Solicitor admits that the term "adjacent place" is ambiguous. Therefore, the negligence involved was reduced. The Solicitor also represents that the No. 1 Bleeder Room had been examined four hours before the start of the shift, that no miners, equipment, methane or other hazards were present in the room. Therefore, gravity was reduced.

The representations and recommendations of the Solicitor are accepted.

Accordingly, the motion to approve settlement is GRANTED and the operator is ORDERED TO PAY $125 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 1, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-197 A. C. No. 36-02735-03501
v.	:	Krieger Coal, Inc.
KRIEGER COAL, INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

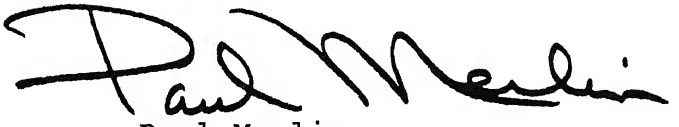
Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the one violation involved in this case. The proposed settlement is for $30.

The Solicitor's motion discusses the violation in light of the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The operator was cited for violation of 30 C.F.R. § 48.8 because two miners were at work without having received annual refresher training. The Solicitor represents that a reduction in the proposed penalty is justified because of the precarious financial condition of the operator. According to the documents submitted with this motion, the operator lost more than $106,000 in 1985 and has mined no coal during 1986. The parties assert that payment of the originally assessed penalty would hamper the operator's efforts to remain in business.

The representations and recommendations of the Solicitor are accepted. However, in the future, necessary training must be provided. Such a low penalty cannot be routinely approved for this type of violation regardless of the operator's financial condition.

Accordingly, the motion to approve settlement is GRANTED and the operator is ORDERED TO PAY $30 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006 October 1, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-214 A.C. No. 36-05018-03604
v.	:	
UNITED STATES STEEL MINING COMPANY, INCORPORATED, Respondent	:	Cumberland Mine

ORDER OF DISMISSAL

Before: Judge Merlin

The Solicitor has filed a motion to withdraw his penalty petition in this case. The Solicitor represents that the two citations involved were withdrawn by MSHA on August 11, 1986. Both citations were issued for violations of 30 C.F.R. § 75.503 because, in the opinion of the inspector, the battery lids on two scoops were not properly fastened. The facts presented by these citations are almost identical to those in two previous cases in which no violation was found. Secretary of Labor v. United States Steel Mining Co., Inc., 6 FMSHRC 155, 156 (1984); Secretary of Labor v. United States Steel Mining Co., Inc., 6 FMSHRC 1510, 1518 (1984). Therefore, the withdrawal of the two citations and the penalty petition is proper.

Accordingly, the motion to withdraw the penalty petition is GRANTED and this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 1, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ANDREW J. DUBETSKY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 86-227-D
	:	PITT CD 86-6
	:	Lancashire No. 20 Mine
v.	:	
BARNES & TUCKER COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

The miner-complainant has reached a settlement with the operator, has accepted a lump sum payment and has elected to withdraw his complaint. The Solicitor concurs with the settlement and supports the motion to withdraw. Upon independent review of the record, it is found that the settlement is fair and in accord with the Act.

Accordingly, the motion to withdraw is GRANTED and this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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October 1, 1986

ALLENTOWN CEMENT COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. PENN 86-229-RM
	:	Citation No. 2625709; 5/1
v.	:	
	:	Docket No. PENN 86-230-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 2625710; 5/1
	:	Docket No. PENN 86-231-RM
	:	Citation No. 2625712; 5/1
	:	Docket No. PENN 86-232-RM
	:	Citation No. 2625713; 5/1
	:	Docket No. PENN 86-233-RM
	:	Citation No. 2625714; 5/1
	:	Docket No. PENN 86-234-RM
	:	Citation No. 2625715; 5/1
	:	Docket No. PENN 86-235-RM
	:	Citation No. 2625716; 5/1
	:	Docket No. PENN 86-236-RM
	:	Citation No. 2625717; 5/1
	:	Docket No. PENN 86-237-RM
	:	Citation No. 2625718; 5/1
	:	Docket No. PENN 86-238-RM
	:	Citation No. 2625719; 5/1
	:	Docket No. PENN 86-239-RM
	:	Citation No. 2625720; 5/1
	:	Docket No. PENN 86-240-RM
	:	Citation No. 2625650; 5/1
	:	Docket No. PENN 86-241-RM
	:	Citation No. 2625651; 5/1
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: Citation No. 2626526; 5/15/86
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: Docket No. PENN 86-257-RM
: Citation No. 2626527; 5/19/86
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: Docket No. PENN 86-258-RM
: Citation No. 2626532; 5/13/86
:
: Evansville Quarry & Mill

ORDER OF DISMISSAL

Judge Merlin

The operator filed the above-captioned thirty notices of contest on July 28, 1986. The contests seek review of citations issued from May 12, 1986 to May 19, 1986.

The Solicitor has filed a motion to dismiss on the ground that the notices of contest are untimely filed. The operator has opposed the motion. Both parties have filed memoranda in support of their positions.

The operator contends that its notices of contest are timely because they were filed within thirty days of the MSHA's notification of the proposed penalty assessments. The operator has failed, however, to submit copies of the notifications it alleges it received from MSHA or even to give their dates. In no event, could the operator's opposition to the Solicitor's dismissal motion be sustained without the necessary documentary support. In any event, in order to expedite consideration of these cases it will be assumed that the notices of contest were filed within 30 days of the operator's notification of the proposed assessments.

Section 105(a) of the Act, 30 U.S.C. 815(a) provides in pertinent part:

> Sec. 105(a) If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. . . If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, . . .the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. . . .

Section 105(d) of the Act, 30 U.S.C. 815(d), provides in pertinent part:

> (d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order

> issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, . . .the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. . . .

The foregoing statutory sections as implemented by Commission regulations establish parallel procedures for the vario types of actions an operator can challenge. With respect to ea of them there is a filing requirement of 30 days. If an operator desires to challenge the issuance of a citation or order, it must file its notice of contest within 30 days of its receipt of the citation or order. See 29 C.F.R. § 2700.20 et seq. under the heading "Contests of Citations and Orders." If operator wants to question a penalty assessment, it may do so within 30 days from its receipt of the notification of proposed assessments. See 29 C.F.R. § 2700.26 et seq. under the heading "Contests of Proposed Assessment of Penalties." By separating notices of contest regarding citations and orders from contests of proposed penalty assessments, the regulations require that citations and orders be contested within 30 days of their recei by an operator and that likewise, proposed penalty assessments contested within 30 days of notification by an operator. The regulations do not contemplate that contests of citations be filed within 30 days of proposed penalty assessments. On the contrary, the regulations specifically provide that an operator failure to file a notice of contest shall not preclude it from challenging the citation in a penalty proceeding. 29 C.F.R. § 2700.22. If the operator could file its notice of contest wh it receives the penalty proposal, section 2700.22 of the regulations would be unnecessary.

The operator seeks to rely upon certain language in sectio 105(a) regarding notification by the Secretary of Labor to the operator of a proposed penalty and contest by the operator with 30 days of the citation or proposed assessment. Section 105(a) is principally concerned with notifications by the Secretary to the operator, whereas 105(d) lays down the conditions precedent to hearing and review by the Commission. Giving proper effect section 105(d) requires a 30-day filing period for notices, orders and proposed penalty assessments respectively, in accordance with Commission regulations, supra.

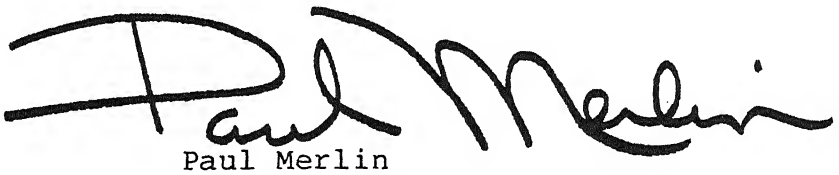
Applicable Commission precedent also demonstrates that a notice of contest of a citation must be filed within 30 days of its issuance. In Energy Fuels Corporation, 1 FMSHRC 299 (May 1979) the Commission considered whether a notice of contest of a citation could be filed within 30 days of the issuance of a citation and before the Secretary proposes a penalty. Under the prior 1969 Mine Safety Act such immediate reviews of abated citations (as opposed to withdrawal orders) had not been allowed. The Commission decided that under the 1977 Act immediate review of citations was available, explaining why it was necessary in many situations such as expensive abatement, special findings of unwarrantable failure, etc. Since under Energy Fuels the operator has the right to contest a citation immediately upon its issuance, giving it the right also to file the same contest later when the Secretary brings the penalty case, would be redundant. The Commission has left open the issue whether an operator who does not file an immediate notice of contest from a withdrawal order can later challenge special findings in a subsequent penalty proceeding, Black Diamond Coal Mining Company, 7 FMSHRC 1117, 1122, n. 7 (Aug. 1985). 1/ Admittedly, Black Diamond concerned a withdrawal order, but that makes no difference. Since the Commission in Energy Fuels gave the same right of immediate review to citations as previously had existed with respect to withdrawal orders, there is no reason now to give an additional right of belated review such as that argued for by this operator with respect to the contest of citations. Also, although the Commission reserved the question in Black Diamond, it has decided penalty cases which involved the special finding of "significant and substantial." Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981); U. S. Steel Mining Co., Inc., 6 FMSHRC 1834 (1984); See also, C.D. Livington, 8 FMSHRC 1006, 1007, n. 2 (1986).

That the operator has no right to file a contest from a citation within 30 days of the proposed assessment notification also is clear from the Commission's decision in Old Ben Coal Company, 7 FMSHRC 205 (Feb. 1985). In that case the operator filed an immediate notice of contest of a citation within 30 days from issuance of the the citation but it did not pursue the subsequent penalty case. The Commission held that the failure to contest the penalty extinguished the operator's right to continue with the contest case. The earlier contest in effect, merges with the subsequent penalty. Under such circumstances existence of a right to file a contest when the penalty case begins would make no sense.

1/ In this case the operator has not raised the issue of special findings.

If the operator has timely contested the civil penaltie proposed for these citations and requested a hearing, then i will be able to contest the validity of the citations in the civil penalty proceedings.

Accordingly, the Solicitor's motion is GRANTED and thes cases are DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 1, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-112 A. C. No. 46-01438-03631
v.	:	Ireland UG Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the one violation involved in this case. The originally assessed penalty was $750. The proposed settlement is for $250.

The Solicitor's motion discusses the violation in light the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Order No. 2714192 was issued for violation of 30 C.F.R. § 75.902 because of the inoperative state of the failsafe ground check circuit. A back-up ground check system was not functioning due to a manufacturer's defect. The Solicitor represents that a reduction in the proposed penalty is justified because the negligence of the operator was less than was originally thought. The company was not aware that the circuit and back-up system were not working. The parties had proposed a settlement of $100. Because of the seriousness of the violation, the initial proposed settlement was rejected and the parties were advised to reconfer. A settlement in the amount of $250 was then proposed.

The representations and recommendations of the parties are now accepted. However, the operator should take whatever action is necessary including discipline, if appropriate, to prevent any recurrence of such an incident.

Accordingly, the motion to approve settlement is GRANTED the operator is ORDERED TO PAY $250 within 30 days of the dat this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 2 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 83-73 A.C. No. 11-00598-03524
v.	:	Eagle No. 2 Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. Respondent has filed a response thereto. I have considered the representations and documentation submitted by both parties and I conclude that the proffered settlement is consistent with the criteria in section 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalties in the amount of $3,000.00 within 30 days of this Decision. Upon such payment this proceeding is DISMISSED.

This Decision and Order were read to counsel for the parties October 2, 1986, and were approved by them before signing below.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 3, 1986

SECRETARY OF LABOR, Mine Safety and Health Administration (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 86-38-M
	:	A.C. No. 33-03990-05507
v.	:	
COLUMBIA PORTLAND CEMENT CO., Respondent	:	Jonathan Limestone Mine

ORDER OF DEFAULT

Before: Judge Merlin

On February 14, 1986, the Secretary of Labor filed a proposal for a penalty against you, the mine operator, for an alleged violation of the Federal Mine Safety and Health Act of 1977. On July 7, 1986, you were ordered to file your Answer to the Proposal or show good reason for not doing so. You have done neither.

Judgment by default shall enter in favor of the Secretary. As a result, you are hereby ORDERED TO PAY the sum of $2,000.00 immediately.

Paul Merlin
Chief Administrative Law Judge

Distribution: by certified mail

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 9 1986

DENNIS AYRES, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 86-65-D
	:	MSHA Case No. VINC CD 86-2
FAIRPOINT COAL COMPANY, Respondent	:	Fairpoint Strip Mine

DECISION

Appearances: Dennis Ayres, Lantana, Florida, pro se;
Rodney D. Hanson, Esq., Thomas, Fregiato, Myser & Hanson, Bridgeport, Ohio, for Respondent.

Before: Judge Koutras

Statement of the Case

This is a discrimination proceeding initiated by the complainant Dennis Ayres against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, alleging that the respondent discriminated against him by discharging him for exercising certain rights afforded him under the Act. Mr. Ayres' initial complaint was investigated by MSHA, and it declined to file a formal complaint with this Commission. Mr. Ayres subsequently filed this action with the Commission pro se.

A hearing was held in Wheeling, West Virginia, on August 26, 1986, and the parties appeared and participated fully therein. At the close of the complainant's case, the parties agreed to settle this dispute, and they have filed sufficient information in this regard to enable me to dispose of the matter.

Discussion

Mr. Ayres testified that he worked for the respondent off and on since May, 1978, and during intervening periods of lay-offs. He was last employed as a dozer operator on October 14, 1985. Except for two weeks between jobs, he has

been steadily employed since leaving the respondent's employ in various construction jobs in Florida. He testified as to the circumstances surrounding his complaint, and he believed that he was discriminated against by the respondent because he was concerned about operating equipment which he believed to be unsafe. He testified about certain events concerning a portion of a highwall which fell on his dozer on October 14, 1985, and his dispute over that incident. Mr. Ayres believed that the incident resulted from the failure of the machine reverse gear to engage properly, and he stated that he had reported this condition to mine management and nothing was done about it (Tr. 8-12, 14-17).

Mr. Ayres testified that on October 14, 1985, shortly afte the highwall incident, he went to the mine office and informed a secretary that November 14, 1985, would be his last day of work. He also told the secretary that if he were further "hassled," he would quit that same day, and even if he were not further "hassled," he was giving notice that November 1, 1985, would be his last day of work (Tr. 12). Later that day, he was confronted by mine foreman Louis Zaccagnini, who purportedly told him "You don't tell me when you're going to quit; I tell you when" (Tr. 13). Mr. Zaccagnini then gave him his paycheck and "it was all over" (Tr. 13-14). Mr. Ayres confirmed that Mr. Zaccagnini did not use the words "you're fired," and simply stated "you're done" (Tr. 14).

Mr. Ayres confirmed that while he was aware of the condition of his machine for 3-weeks prior to the highwall incident on October 14, and was aware of his right not to operate unsafe equipment, he nonetheless operated the machine and never refuse to operate it because he believed it was unsafe. He did so because he was afraid he would be fired if he refused to operat the machine (Tr. 17-18). He also confirmed that Mr. Zaccagnini accused him of causing the highwall incident which resulted in damage to the machine, but Mr. Ayres took the position that if the reverse gear were operating properly, he could have backed away from the highwall and avoided the falling material (Tr. 18-19).

Mr. Ayres confirmed that prior to his purported discharge, he filed no complaints with MSHA, but did report the condition of his machine to mine management (Tr. 20). He conceded that management dispatched a mechanic to look at the machine the same day that he complained, and he believed that management's response was appropriate (Tr. 21). He also conceded that Mr. Zaccagnini did not tell him that he was fired because of hi complaints about the machine, or that if he did not operate the

machine in the condition that it was in, that he would be fired (Tr. 21). Mr. Ayres confirmed that after the mechanic looked at the machine, he did not inform Mr. Zaccagnini that he was still having a problem, and made no further complaints to anyone (Tr. 22).

Mr. Ayres conceded that operator error may cause the type of incident which occurred at the highwall in question. He also conceded that he operated the machine for approximately an hour and a half prior to the incident in question, did not believe that he could get hurt, and that he could run the machine "the best I could with the machine I had" (Tr. 27). He confirmed that after the highwall fall, his supervisor Bill Simmons instructed him to work with the mechanic to get it ready to operate, and no one told him to operate it in an unsafe condition (Tr. 28). He also confirmed that after thinking about it further, he became angry and decided to inform management that he quit his job (Tr. 28). He conceded that had he not been terminated earlier by Mr. Zaccagnini, November 1, 1985, would have been his last day of work, and he would have quit that day (Tr. 30-31). He also conceded that he did not inform the secretary of any reasons for giving notice that he would quit (Tr. 31.).

Mr. Ayres confirmed that he had in the past engaged in a dispute with mine management over an incident concerning his wearing of short pants on the job, but he denied cursing or threatening a foreman. He also confirmed that he was sent home on September 9, 1985, because of this dispute, but was not fired or threatened with termination (Tr. 32-36). Mr. Ayres stated that he got along well with mine management, was never disciplined, and that he had a good attendance record (Tr. 39-40).

At the close of his case, Mr. Ayres indicated to the court that he would be receptive to a settlement of his dispute with the respondent. The parties were afforded an opportunity to explore this further, and they agreed that Mr. Ayres would be paid for 2-weeks pay from October 14, 1985 to November 1, 1985, in the gross amount of $760, subject to the usual deductions, and Mr. Ayres would execute a release and his complaint would be dismissed (Tr. 42-43). Mr. Ayres stated that he was satisfied with this settlement of his complaint (Tr. 44).

Conclusion

The parties have now finalized their agreed-upon settlement disposition of the complaint filed in this case. Mr. Ayres has received a cashier's check from the respondent in the net

amount of $556.35, after appropriate social security and incom tax deductions, and he has executed a release and agreement dismissing his complaint with prejudice. Under the circumstan I am satisfied that the agreement is reasonable and in the pub interest and in accord with the intent and purposes of the Act I see no reason why this matter should not now be dismissed.

ORDER

In view of the foregoing settlement disposition of this matter, and having concluded that the parties have complied with the terms of their agreement, this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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Rodney D. Hanson, Esq., Thomas, Fregiato, Myser & Hanson, 320 Howard Street, Bridgeport, OH 43912-1197 (Certified Mail)

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FALLS CHURCH, VIRGINIA 22041

OCT 9 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 86-62 A. C. No. 40-02876-03503
v.	:	No. 1 Mine
K C MINING COMPANY, Respondent	:	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Archie Ketchersid, Whitwell, Tennessee, for Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). On the record at the hearing on September 18, 1986, at Nashville, Tennessee, the parties jointly moved for approval of a settlement agreement and dismissal of the case. The violation in this case was originally assessed at $478 and the respondent has agreed to remit the full amount in installments of $150, commencing on October 1, 1986, with a second $150 installment on November 1, 1986, a third on December 1, 1986, and a final payment of $28 on January 1, 1987.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of a settlement is GRANTED, and it is ORDERED that respondent pay a penalty of $478 as set out above. Upon payment in full, this proceeding is DISMISSED.

Roy J. Maurer
Administrative Law Judge

Distribution:

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Archie Ketchersid, K C Mining Co., Route 2, Box 337-A, Whitwell, TN 37397 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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DENVER, COLORADO 80204

OCT 9 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 85-157-M
	:	A.C. No. 04-00030-05503
v.	:	Brubaker-Mann
BRUBAKER-MANN INCORPORATED, Respondent	:	

AMENDMENT TO DECISION

Comes now John J. Morris, Administrative Law Judge in the above case, and states that the above decision was issued on September 30, 1986. Further, the Commission has not yet directed this decision for review.

Pursuant to Commission Rule 65(c), 29 C.F.R. § 2700.65(c), the judge amends said decision by striking all of the decision beginning with "Summary of the Evidence" and substituting a new portion therefor.

This amendment is necessary to correct a clerical mistake that occurred when the text from WEST 85-177-M was erroneously transposed to this case.

The full text of the amended decision is attached hereto.

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
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OCT 9 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-157-M A.C. No. 04-00030-05503
v.	:	Brubaker-Mann
BRUBAKER-MANN INCORPORATED, Respondent	:	

AMENDED DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner;
Steve Pell, Esq., Ventura, California, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contrary to respondent's contentions in WEST 84-96-M.

Stipulation

The parties stipulated that respondent is a small operator. Further, respondent is subject to the Act unless MSHA's jurisdiction is pre-empted by the California Occupational Safety and Health Administration (Tr. 191, 249).

Citation 2364576

This citation charges respondent with violating 30 C.F.R. § 56.6005 which provides as follows:

§ 56.6005 Areas around storage facilities.
Areas surrounding magazines and facilities for the storage

of blasting agents shall be kept clear of rubbish, brush, dry grass, or trees (other than live trees 10 or more feet tall), for a distance not less than 25 feet in all directions, and other unnecessary combustible materials for a distance of not less than 50 feet.

Summary of the Evidence

MSHA Inspector Ronald Ainge issued this citation when he found two pieces of lumber within six feet of a power magazine. In addition, there were railroad ties within 20 feet of the magazine (Tr. 58, 129). In the inspector's opinion several hundred railroad ties are unnecessary for a mining operation (Tr. 125, 126). However, there were loading docks in the area (Tr. 126).

The railroad ties were higher than the nearby rock pile (Tr. 124).

While the inspector considered that an accident was unlikely he believed a fire could involve the powder magazine with a result explosion (Tr. 58, 125).

Powder magazines also fall under the jurisdiction of other federal, state and county authorities (Tr. 127, 128, 215).

Mr. Mann testified that the area met the requirements of the federal firearm and explosives representatives (Tr. 243, 244). These authorities required the company to install a stone berm approximately 10 feet high and the company complied (Tr. 244).

Evaluation of the Evidence

The facts establish a violation of the regulation. There were two pieces of timber and several hundred railroad ties within 20 feet of the powder magazine. I concur with the inspector's view that such a large number of ties constitute "unnecessary combustible material" as prohibited by the regulation.

Concerning Mr. Mann's testimony: I accept his statements that other federal authorities required a stone berm. But I do not find it credible that they would also require railroad ties in such close proximity to the magazine.

Citation 2364576 should be affirmed.

Civil Penalty

The statutory mandate to assess civil penalties is contained in section 110(i) of the Act, now codified 30 U.S.C. § 820(i). Concerning prior history: the computer printout (Ex. P34) shows that respondent had no violations in the two-year period ending March 5, 1985. The printout shows two violations before March 6, 1983. But, as the respondent contends, these would appear to be

the two citations vacated in Brubaker-Mann, 2 FMSHRC 227 (1980). Accordingly, I conclude that the Secretary has failed to prove any adverse history on the part of respondent. The parties have stipulated that the operator is a small company. The penalty appears appropriate in relation to a small operator and it should not affect the ability of the company to continue in business.

Concerning the negligence of the operator: the condition around the powder magazine was obvious. Several hundred railroad ties are readily apparent. Accordingly, the operator must be considered to be negligent. The gravity is minimal since it is not likely that an explosion would occur. Finally, the operator is credited with statutory good faith since the company abated the violative condition.

On balance, I consider that the proposed penalty of $20 should be reduced to $15.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered.

1. The Commission has jurisdiction to decide this case.

2. Citation 2364576 should be affirmed and a penalty of $15 assessed.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 2364576 is affirmed.

2. A civil penalty of $15 is assessed.

John J. Morris
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

October 16, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 84-68-M
	:	A.C. No. 24-00174-05515
v.	:	
	:	Docket No. CENT 84-69-M
AMAX CHEMICAL CORPORATION, Respondent	:	A.C. No. 29-00174-05516
	:	
	:	Amax Mine & Mill

ORDER LIFTING STAY
AND
DECISION APPROVING SETTLEMENT

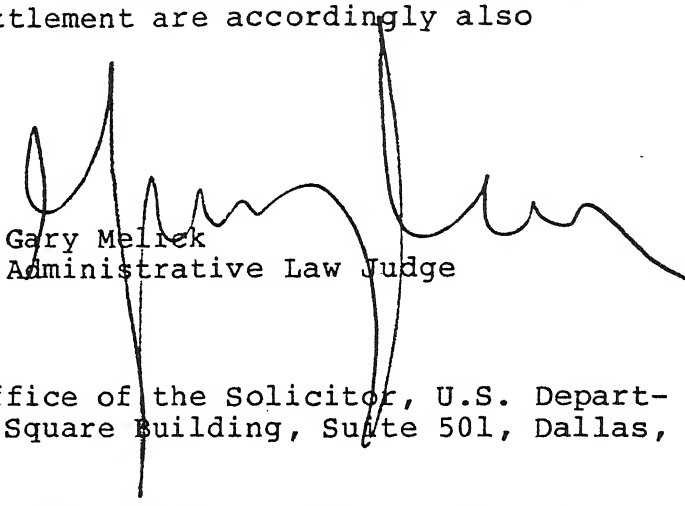
Appearances: Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Petitioner;
Charles C. High, Jr., Esq., Kemp, Smith, Duncan & Hammond, El Paso, Texas, for Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 110(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner had filed motions to approve settlement agreements and to dismiss the cases proposing a reduction in penalties from $2,925 to $445. These motions were denied by the undersigned and hearings on the merits were held. Following those hearings and the subsequent release by the Commission of the decision in Secretary v. Amax Chemical Corporation, 8 FMSHRC ____ (Docket No. CENT 84-91-M) the parties renewed their request for settlement. I have considered the testimony and documentation submitted and I have evaluated the effect of the Commission's decision in Amax, supra, on these cases. Under the circumstances I now conclude that the proffered settlement is appropriate.

WHEREFORE, the Stay Orders issued June 18, 1985 are lifted, the motions for approval of settlement are GRANTED, and it is ORDERED that Respondent pay a penalty of $445 within 30 days of this order. The deletion of "significant

and substantial" findings and the vacation of citations set forth in the Motion for Settlement are accordingly also approved.



Gary Mehrek
Administrative Law Judge

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OCT 16 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 85-204
	:	A.C. No. 36-02405-03596
v.	:	
	:	Greenwich No. 1 Mine
GREENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION, Respondent	:	
	:	
GREENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 85-114-R
	:	Order No. 2255733-01; 1/17/85
v.	:	
	:	Greenwich No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

DECISIONS

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner/Respondent;
Joseph T. Kosek, Jr., Esq., Ebensburg, Pennsylvania, for Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a civil penalty proceeding initiated by MSHA against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking a civil penalty assessment for an alleged violation of mandatory safety standard 30 C.F.R. § 75.316, as stated in a section 104(a) Citation No. 2255733, with special

"significant and substantial" (S&S) findings, issued by an MSHA inspector on January 16, 1985. The citation was subsequently modified by the inspector on January 17, 1986, to a section 104(d)(2) Order No. 2255733-01. The contest was filed by the contestant to challenge the legality of the order.

The cases were consolidated for hearing, and the parties appeared and participated fully therein. Greenwich filed a posthearing brief, but MSHA did not. However, I have considered its oral arguments made during the hearing.

Issues

The issues presented are whether or not the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, whether the alleged violation was "significant and substantial," and whether it constitutes an "unwarrantable failure" by the contestant to comply with the requirements of the standard in question. Additional issues raised by the parties are identified and disposed of in the course of these decisions, including an appropriate civil penalty assessment for the violation in question.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-165, 30 U.S.C. § 801 et seq.

2. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

1. The Greenwich No. 1 Mine is owned and operated by the respondent/contestant Greenwich Collieries.

2. Greenwich Collieries and the No. 1 Mine are subject to the Act.

3. The presiding administrative law judge has jurisdiction to hear and decide these cases.

4. The subject order issued in these proceedings was properly served on a representative of Greenwich Collieries and may be admitted to establish its issuance and service.

5. Payment of the assessed civil penalty will not adversely affect the respondent/contestant's ability to continue in business.

6. The respondent/contestant's annual coal production is approximately two million tons. Mine production for the No. 1 Mine is approximately 877,000 tons annually. Greenwich Collieries is a medium-to-large mine operator.

7. The respondent/contestant exhibited ordinary good faith in timely abating the cited condition or practice.

8. Respondent/contestant's history of prior paid civil penalty assessments consists of 245 paid assessments for the first 9 months of 1985, 214 in 1984, and 155 in 1983.

9. The 104(d) "chain" is properly established in that no intervening "clean" mine inspections took place immediately preceding the issuance of the subject contested section 104(d)(2) order.

MSHA's Testimony and Evidence

MSHA Inspector Samuel Brunatti stated that he is a ventilation specialist, and he testified as to his experience and training. He confirmed that he issued a section 104(a) Citation No. 2255733, on January 16, 1985, but that the conditions cited were previously observed by him when he was at the mine on January 10, 1985. He explained that his supervisor instructed him to go to the D-9 area of the mine during the midnight-to-8:00 a.m. shift on January 10, to examine the area. The mine had experienced a large methane accumulation and miners were withdrawn when he arrived at the mine.

Mr. Brunatti identified exhibit G-2, as a copy of a portion of the mine map depicting the area in question and he confirmed that he made notations on the map on January 10, depicting the direction of air flow, and his air and methane readings. He confirmed that he determined the direction of air flow by means of a smoke test and observation (Tr. 17-23).

Mr. Brunatti confirmed that when he was at the mine on January 10, there was no methane accumulation and he indicated that he complimented the company for the job they did in clearing away the methane which prompted the withdrawal of miners. He confirmed the prior methane accumulation by reviewing the mine examiner and foreman books (Tr. 24). He also confirmed that he issued no citations or orders on January 10, and that he was at the mine in his capacity as the resident inspector and was not at that time a ventilation specialist. He also confirmed that he did not have the appropriate ventilation plan with him on January 10, and had no knowledge of the ventilation system (Tr. 24).

Mr. Brunatti stated that after completion of his inspection on January 10, his supervisor was concerned about the methane incident and he asked to review his notes. After a discussion with his supervisor and a review of his notes and the appropriate ventilation plans, it was determined that the conditions he observed on January 10, with regard to the direction of the air flow constituted a violation of the plan (Tr. 25).

Mr. Brunatti identified exhibit G-3 as the ventilation plan for the D-9 area in question, which was approved by MSHA on June 7, 1985. Exhibit G-3(a) is the August 1, 1984, plan for ventilating the active section while producing coal, and the direction of air flow over the gob into the bleeder entries, and to the return. Both plan provisions are applicable in this case, and the June 7, provisions in no way changed the requirements of the plan reviewed on August 1 (Tr. 26).

Mr. Brunatti explained the ventilation plan requirements for maintaining the direction of air flow over the cited D-9 area of the mine. He confirmed that the conditions he observed on January 10, which he noted on exhibit G-2, reflect that the air ventilating the section was escaping out of the return instead of putting pressure on the gob area, thus creating, in his opinion, a methane build-up in the back end of the gob area. It was his view that had all of the available ventilation air been placed on the gob, and had proper air pressure been maintained on the gob, the methane build-up previously experienced would not have occurred. He confirmed that he issued the citation because the air flow was misdirected in violation of the ventilation plan because in two of the three entries in the area, air was travelling inby, when in fact the plan depicts the air flowing outby.

In support of the violation, Mr. Brunatti stated that the ventilation plan provision shown on the second page of exhibit G-3, at the upper left-hand corner, depicts a double arrow pointing to the top of the page indicating the direction of air flow over the gob and exiting at the point marked BE #58, which is the evaluation point for checking methane liberation and air flow. At that point, the air then travels down the three entries in the direction of the three double arrows shown on the diagram and out the return. In contrast to these required air directions, on January 10, he found that the air was travelling down the number one entry, but in the opposite direction in the adjacent two entries (Tr. 27-33).

Mr. Brunatti confirmed that the section 104(a) citation issued on January 16, was subsequently modified to a section 104(d)(2) order the next day. He confirmed that it was modified after some discussion with his supervisor, but that he (Brunatti) made the decision to modify the citation to an order. Mr. Brunatti stated that his notes for January 16, reflect a conversation with company safety representative DeSalvo and mine foreman Richard Endler, during which they stated that they believed that the direction of air flow as found by Mr. Brunatti on January 10, was the way it was depicted on the ventilation plan, but was contrary to the way the company engineer submitted it on the plan. Mr. Brunatti stated that mine management was ventilating the section one way, but that the plan submitted by the engineer indicated ventilation in a different way. Mr. Brunatti stated further that he had the "impression" that Mr. DeSalvo and Mr. Endler were aware of the fact that the direction of air on January 10, was different from that shown on the submitted plan, but he conceded that he could not confirm that they had actual knowledge of the plan requirements until he later called it to their attention (Tr. 36).

Mr. Brunatti confirmed that the No. 1 Mine is on a section 103(i) 5-day spot inspection status because it has a history of methane ignition, and that an explosion occurred at the mine in February or January of 1984, resulting in the death of three miners. The explosion was the result of an accumulation of methane (Tr. 37).

Mr. Brunatti confirmed that at the time he issued the initial citation on January 16, he marked the citation form to reflect "moderate negligence," and that he did so because "I wasn't really aware of all that was involved, you know, as far as the ventilation changes I'm sure" (Tr. 37). He also stated that he was influenced by the fact that the company had withdrawn the miners and had done a fine job in correcting the methane problem. He later realized that mine management should have been aware of the ventilation plan requirements (Tr. 38).

Mr. Brunatti stated that the ventilation plan is designed to prevent methane accumulations, and that "what could happen here is a methane gas explosion." If the cited condition were left uncorrected, he believed it was highly likely that an explosion would have occurred because the area was a pillar area where the roof is constantly falling, and sparks from a roof fall would be an ignition source to ignite the methane. He conceded that he had no knowledge of any such ignitions from roof falls in the mine in question, but was aware of such

an occurrence in another mine (Tr. 40). Mr. Brunatti confirmed that he indicated on the citation form that one miner would be affected by a methane explosion because the area where the air was misdirected was an outby area which was not in an active working section (Tr. 39). He also conceded that while the mine has experienced numerous roof falls, they are planned falls connected with pillar recovery and the "majority probably weren't violations" (Tr. 44). He pointed out, however, that the cited area was only required to be examined once a week, and it was an area that was "coming off the gob" (Tr. 45).

Mr. Brunatti stated that the mine had experienced problems in ventilating other gob areas, and that this was a contributing factor to the explosion which previously occurred. He also indicated that had an explosion occurred in the instant case, "the whole working section" would have been affected because it was in close proximity to the cited area (Tr. 46).

On cross-examination, Mr. Brunatti confirmed that at the time he inspected the mine on January 10, and issued the citation on January 16, 1985, he was not a ventilation specialist and that the citation was issued as part of a regular mine inspection (Tr. 48). He stated that he was the resident inspector at the mine, and that he was at the mine during the period from January 10 to January 16, but was not in the D-9 section (Tr. 53). He confirmed that while at the mine on January 16, he did not conduct an inspection of the D-9 section, and simply issued the citation on the basis of the information that he had previously compiled when he was there on January 10 (Tr. 54). The conditions described in the citation were conditions which existed on January 10, and not on January 16, and he did not know what the ventilation conditions were on January 16 (Tr. 56).

Mr. Brunatti stated that the methane accumulation on January 9, 1985, was 4.2 percent, and that he confirmed this information from a review of the mine books for that day. He confirmed that he commended mine management for their reaction to the methane accumulation and for the steps taken to protect the miners, and respondent's counsel confirmed that the miners were voluntarily withdrawn by mine management, and that management contacted MSHA and the appropriate state agency. Counsel also asserted that at the time Mr. Brunatti was at the mine on January 10, the methane had been dissipated and the mine was back in production (Tr. 59).

Mr. Brunatti stated that he took methane readings on the morning of January 10, and detected no methane levels which were in violation of the regulations. The mine was in compliance with the methane requirements, even though the ventilation air was flowing in the wrong direction (Tr. 62). However, Mr. Brunatti believed that the prior methane reading of 4.2. recorded in the mine books on January 9, was caused by the air being coursed in the wrong direction, and that the condition was corrected by making some adjustments to the ventilation system (Tr. 63).

Mr. Brunatti stated that the ideal ventilation for any mine is to insure the maintenance of air pressure on the gob area so that the majority of air is coursed to the gob. In the instant case, the majority of air was escaping outby, and only a minimal amount was coursed to the gob to dilute any methane which may have been present. Since methane concentrations and liberation change because of roof falls or other conditions, the ventilation plan is intended to control these events (Tr. 64). Referring to exhibit G-2, Mr. Brunatti explained the desirable and required methods for ventilating the right and left entries while they were partially and fully developed (Tr. 66-71).

Mr. Brunatti confirmed that when he was at the mine on January 10, certain changes had been made to the ventilation system, but he still had a problem with the direction of the air flow. However, he stated that "at that time, I wasn't aware that it was a problem" (Tr. 73). He confirmed that during the period between January 10 through 17, he was not aware of any additional methane build-up in the gob at the back of the D-9 area, even with the ventilation air flow as he found it (Tr. 73).

Mr. Brunatti confirmed that when he issued the citation on January 16, he marked the "negligence block" on the form as "moderate," and when he subsequently modified the citation to a section 104(d)(2) order on January 17, he did not change his negligence finding (Tr. 72). He testified that he did not believe that the company was indifferent to the requirements of the cited mandatory standard, but felt that there may have been a miscommunication between mine management and the company engineer with respect to the ventilation plan which had been submitted, and with respect to the actual ventilation in the area in question (Tr. 74).

Mr. Brunatti stated that he did not believe that the violation in question resulted from the company's willful intent to violate the law, or that it resulted from a serious

lack of reasonable care on the part of the company (Tr. 74). He confirmed that he modified the citation to an order after discussing the matter with his supervisor (Mr. Baesinger), and he explained the reasons for his action as follows (Tr. 75-76):

> A. But basically, we discussed the ventilating system, the type of changes that were made which caused the air to flow in the wrong direction. And it was determined that mine management had to be directly involved in that.
>
> I mean, to say this could have occurred without them knowing, or should have knowing, however you want to say it -- well, it just couldn't. You know, the company is responsible -- mine management is responsible for ventilation and installing or removing ventilation controls from the ventilating system.

Mr. Brunatti confirmed that the ventilation plan "Review No. 26" as depicted on the first page of exhibit G-3, was not applicable at the time of the violation, and that plan "Review No. 25," exhibit G-3(a), is the applicable plan provision in this case (Tr. 79-80). MSHA's counsel stated that the plan requirements as depicted in both exhibits were essentially the same requirements, and that exhibit G-3 had not modified exhibit G-3(a) in any way for the purpose of the D-9 section of the mine (Tr. 80).

In response to further questions, Mr. Brunatti stated that his notes made on January 16, 1985, (exhibit G-4), confirm that mine management agreed with his observations that the air was being coursed in the wrong direction, and that there may have been miscommunication among those management people who were in charge of the ventilation system. He also stated that it is reasonable to expect a mine foreman to check to see what the ventilation should be for a particular mine section and to know what the plan provides in this regard. He also believed it was reasonable for those who designed the system to communicate with the foreman concerning the plan provisions (Tr. 82).

Mr. Brunatti explained the extent to which the cited area in question had been developed when he went to the mine on January 10, and he explained why the air should have been directed in the manner that he required as follows (Tr. 86):

> Good ventilation is, you put the majority of your air or positive pressure on your gob, with just leaving a little bit amount to ventilate that section return to keep whatever little bit of methane is being liberated in that area off the ribs.
>
> Positive pressure on the gob reduces the methane and dilutes it and renders it harmless, taking it into the bleeder entries to return to the fan and out of the mine, and keeping it below an explosion mixture.

Mr. Brunatti stated that when he went to the mine on January 10, he was there to determined whether the large accumulation of methane still existed. When he determined that it did not, he stated that "I was done with what I was sent there to do" (Tr. 92). Although he made a determination as to the direction of the air used to ventilate the area in question, he did not at that time know whether it was right or wrong, but later made this determination a day before he issued the citation on January 16, after he and his supervisor reviewed the ventilation plan and determined that a violation had occurred on January 10 (Tr. 93; 96-97). When asked to explain the basis for his conclusion that the misdirected air caused 4.2. methane accumulation on January 9, but did not cause any accumulations on January 10, he replied in pertinent part as follows (Tr. 94): "I base that on some of my experience in and around the mine, based on other conditions of that air, the system ventilating that area. * * * I don't feel that the ventilating system was rendering the methane constantly harmless."

Mr. Brunatti confirmed that even though miners were withdrawn as the result of the 4.2 methane accumulation on January 9, MSHA did not conduct any investigation to determine the cause for this amount of methane. In his opinion, the high methane level was caused by inadequate ventilation, and the misdirected air was one contributing factor (Tr. 95). He confirmed that even though adjustments were made to the ventilation system to dissipate the prior 4.2 level of methane, the continued misdirection of air did not result in unusual or illegal methane accumulations (Tr. 96).

Mr. Brunatti stated that while the misdirected air condition which he found on January 10, was "questionable," he could not remember whether he discussed the condition with mine management at that time (Tr. 98). He conceded that had

his supervisor not raised a question concerning the ventilation, it was "very possible" that the citation would not have been issued (Tr. 97). He reiterated that on January 10, he made no determination that the direction of the air was in violation of the ventilation plan (Tr. 98).

Mr. Brunatti stated that he had no knowledge as to how the cited condition was abated because another MSHA inspector terminated the order (Tr. 112). MSHA's counsel stated that the order was terminated by MSHA Inspector Carl Sensibal on January 21, 1985 (exhibit G-1), and the termination reads "as determined with a chemical smoke cloud the air is now travelling in its proper course (outby). Ventilation adjustments were made to assure proper air flow direction through the affected bleeder entry in the D-9 butt area" (Tr. 113, exhibit G-1).

Respondent' Testimony and Evidence

Richard Endler, mine foreman, testified as to his duties and experience, (Tr. 117-121). He stated that he has taken several training courses in mine ventilation and that he participates in the preparation and approval of the company's 6-month ventilation plans submitted to Federal and state agencies. He confirmed that at the time of the violation, plan "review 25" was in effect, and that he participated in the preparation and approval of that plan (Tr. 122).

Referring to several exhibit overlays which were projected on a screen in the courtroom, Mr. Endler explained the projected mining for the D-9 area at the time of the violation, the applicable ventilation plan provisions, the projecte method for developing the entries, the intended direction of air through the areas in question, and the operation of the ventilation system (Tr. 125-133; exhibits O-2 through O-8).

Mr. Endler disagreed with Inspector Brunatti's interpret tion of the applicable ventilation plan, and insisted that th direction of the air on January 10, was exactly the way the applicable plan "review 25" (exhibit G-3(a)) was submitted an approved. That plan shows the air going up both entries in the completed first butt heading that had been driven. Mr. Endler explained that Mr. Brunatti believed that the arro depicted in the upper left-hand corner of the plan sketch depicted air flow down through all three entries, but Mr. Endler could find nothing in the plan supporting Mr. Brunatti's interpretation. Mr. Endler stated that no changes were made in the ventilation depicted in the plan in question which would have resulted in the air flowing down al

three entries as interpreted by Mr. Brunatti. Contrary to Mr. Brunatti's interpretation, Mr. Endler insisted that plan "review 25" and exhibit O-2 depict the air going up two entries and down the third one, and that this was precisely how it was directed on January 10, when Mr. Brunatti tested it. Mr. Endler believed that the dispute lies in the fact that Mr. Brunatti believed the arrow at the top left-hand corner of "review 25" reflects that the air should go down all three entries (Tr. 135-137).

Mr. Endler explained that in the development of a section, three entries are driven, and the belt is always the middle entry. He explained that air is always going up the middle belt entry, as well as up the right-hand entry, and then down the left-hand entry. Any changes in the direction of the air flow could only be made by submitting them to MSHA for approval. He finds nothing in plan "review 25" to indicate any change in the direction of air down all three entries (Tr. 146-148).

Mr. Endler confirmed that the order was terminated after changes in the air flow direction were made to comply with Mr. Brunatti's requirements, and he identified exhibit O-8 as the plan revision accepted by MSHA as part of "review 25." He confirmed that at the time the order was issued, Mr. Brunatti believed the direction of air flow should have been as shown in the plan revision submitted to terminate the order, and had it been that way, no citation would have been issued (Tr. 148-151).

On cross-examination, Mr. Endler stated that exhibit O-2 was submitted as part of the ventilation plan to depict how the mining of the area would be developed, and that it does not basically reflect how a gob area should be ventilated during retreat mining (Tr. 156-157). He confirmed that "review 25," exhibit G-3(a), reflects how a gob area should be ventilated. He explained that air would be directed up and across the gob area by means of regulators and restricting the area on the return by use of canvass which forces the air through the holes that are created. He confirmed that at the time the violation was observed by Mr. Brunatti, retreat mining was taking place in the cited area in question (Tr. 157-158).

Mr. Endler stated that the air in the back-end of the D-9 area was being coursed in the direction depicted on "review 25." He stated that Mr. Brunatti was concerned about the direction of air flow in the adjacent panel that had been driven, and that he did in fact determine that it was being

coursed up two entries and down the third entry, but believed that it should have been coursed down all three entries as shown in the print submitted to abate the order, (exhibit O-8; Tr. 160-161).

In response to additional questions, Mr. Endler confirmed that at the time the citation was issued he and representatives of the company safety department discussed the plan provision found in "review 25" with Mr. Brunatti, and that there was disagreement between the company and Mr. Brunatti as to the significance of the arrow shown in the plan. His testimony in this regard is as follows (Tr. 165-171):

* * * * * * *

And I argued with Mr. Brunatti that that arrow, to me, didn't designate that that air was supposed to come down all three entries. And he argued back that it meant that it was.

And naturally, they have more clout than what I have, so the violation was issued. I lost my case on that. But that arrow, to me, still does not depict air flow in the adjacent panel. No matter how many times I look at it, I can't visualize how that depicts air flow down the other three entries.

JUDGE KOUTRAS: Well, where would the air go, after it -- with all these stoppings in place here, then?

THE WITNESS: The air would go out the single entry on the far left-hand side.

* * * As far as I'm concerned, the air, with the ventilation that I know that we had in there, the air would travel across these two entries and proceed down the single entry.

* * * * * * *

JUDGE KOUTRAS: Okay. And where did the inspector say that that would go?

THE WITNESS: The inspector said that it meant that air was supposed to go down this entry.

JUDGE KOUTRAS: And you're saying, no, it just goes across the top, because you have air coming up there?

THE WITNESS: Yes.

JUDGE KOUTRAS: And he said the air coming up there was not in compliance with your plan?

THE WITNESS: Yes, he did.

JUDGE KOUTRAS: And what did he base that on?

THE WITNESS: His opinion.

* * * * * * *

THE WITNESS: Okay, Once these connections were made at the top, these two crosscuts were put through up at the top, then you could change the air around. But we did not have a plan submitted in Review 25 that would have permitted me to turn that air around in them other two entries. I had to keep that air going that way.

JUDGE KOUTRAS: Again, on the 10th, how was the air going in the air that he cited?

THE WITNESS: It was going up the two entries.

JUDGE KOUTRAS: Okay. No dispute about that.

THE WITNESS: No.

JUDGE KOUTRAS: And that's the way you intended it to go?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And that's the way your plan intended it to go?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And the dispute is that the inspector says, "You're right, the air's going that way, but under your plan it should be going in the other direction?"

THE WITNESS: That's right.

JUDGE KOUTRAS: And you claim that that was never the intent?

THE WITNESS: No.

JUDGE KOUTRAS: And that that arrow at the top only --

THE WITNESS: That arrow at the top only denotes air flow from the gob as proceeding out through these other two crosscuts at the top. It shows a movement at the back of the gob to the adjacent entries that we had driven up. That's all that arrow shows to me.

JUDGE KOUTRAS: How is the present plan now? You still have the arrow at the top?

(Pause.)

THE WITNES: Yes, sir.

JUDGE KOUTRAS: What's the difference between the arrow at the top now under this plan and the way it was on this other one, prior to the citation?

THE WITNESS: These two arrows coming down the other two entries. That's the difference. We changed the air around to bring the air -- all of the air that was coming through the gob now came down these three entries and ventilated this back here. Prior to that, I had this air that was coming out here going up these two entries, as per the plan.

JUDGE KOUTRAS: What have you accomplished now that you didn't have before, from your point of view, in terms of ventilation?

THE WITNESS: The ventilation is still the same, as far as I'm concerned. I still have the same amount of air. I didn't really change any --

JUDGE KOUTRAS: Do you feel that the inspector actually believed that your accumulation -- that your methane problem that you had that caused the withdrawal of miners was due to the fact that you weren't ventilating this area in the manner in which he felt your plan required it to be ventilated?

THE WITNESS: No, I don't believe that's why it occurred.

JUDGE KOUTRAS: Do you get the impression that's why he issued the citation in this case?

THE WITNESS: Yes, sir --

JUDGE KOUTRAS: Did he tell you that?

THE WITNESS: No -- maybe, you know. It's possible that that discussion came up.

* * * * * * *

JUDGE KOUTRAS: Well, can I ask you something? When this thing was submitted, G-3A was submitted, why wasn't it as explicit as it is -- as it was made after it was --

THE WITNESS: I --

JUDGE KOUTRAS: Do you have any idea?

THE WITNESS: No. I mean, it was just drawing the depicted air flow at the back-end of that gob. It didn't intend to show air flow in the adjacent panel that was already driven, because we had already shown how that was going to be ventilated with the prior print, that showed the air going up those two entries and down the outside one. And really, all that is showing is, the air that's coming through the gob being carried away down the other entry, the outside entry.

MR. KOSEK: Your Honor, if I might --

JUDGE KOUTRAS: Yes?

MR. KOSEK: -- the reason we made the submission was so we wouldn't get any more violations. I don't know that Mr. Endler would necessarily agree with that submission. But obviously, in order to terminate the violation, that's what we did.

MSHA's Rebuttal Testimony

John A. Kuzar, MSHA Hastings, Pennsylvania, Field Office Supervisor, testified as to his experience and background, including 6 years as a ventilation specialist, and 3 years as a mine inspector. He confirmed that he was not at the mine in question when the citation and order was issued, and that he last visited the mine sometime in 1982 (Tr. 174-176). He also confirmed that he has no supervision over the No. 1 Mine, but does supervise the inspections of the No. 2 Mine (Tr. 178).

Mr. Kuzar confirmed that while he familarized himself with plan "review 25" during the 2 days of hearings, he was not familiar with the plan in 1985 when the citation and order were issued (Tr. 179). MSHA's counsel conceded that Mr. Kuzar had no personal knowledge as to what prompted Inspector Brunatti to issue the citation (Tr. 181).

Referring to the right-hand portion of the sketch depicting plan "revision 25," exhibit G-3(a), Mr. Kuzar described it as follows (Tr. 182-183):

A. This face print that is in front of me right now shows a retreating -- first of all, it shows a bleeder system established around this gob. Okay? It shows -- it says, "BE," but in reality, it's an IE.

It's a retreating inlet evaluation point to assure that you've got positive pressure on the inby end of this gob, which in turn -- this is a bleeder system around the top.

You must maintain a bleeder around the gob area to assure positive pressure on the gob, and all the gases are diluted and swept out to the return pull to the fan. Now, as far as what I'm seeing right here, this looks all right.

But over here, on the other side --

Q. Okay, Now, you were pointing originally to the right side.

A. Yes, ma'am.

Q. Now, you're pointing over the left side?

A. That is correct, which is the table off the diagram. This is where the problem is, I guess, with which way the air was supposedly going.

* * * * * * *

THE WITNESS: If there was a regulator there -- which I do not know -- and the regulator was controlled, yes, it would shove air up there. But if it was open, what it would be would be a direct short to the return.

The problem we're addressing here is the fact of 316 being direction of air flow or what have you, where you have more of a problem that apparently this had occurred, or the mine wouldn't have been withdrawn.

It is 329, in which 329 states that gob areas -- bleeder entries shall be ventilated in such a manner to prevent any of this occurring, any of this methane gas being pushed back out.

When asked about the hazard presented by ventilating th cited area in the manner in which it was being ventilated at the time the citation issued, Mr. Kuzar responded "I wasn't there. I don't know" (Tr. 188). He then proceeded to expla "You have the possibility of that methane coming back over that equipment, that section that was working" (Tr. 192). I response to further questions, he stated as follows (Tr. 193-197):

JUDGE KOUTRAS: What's the significance of that arrow at the top of the page there that seems to be the focal point?

THE WITNESS: This arrow?

JUDGE KOUTRAS: Yes?

THE WITNESS: This arrow here shows me everything going to return through my bleeder entries, across the top. It shows me going -- because, what I'm getting at, air doesn't -- you don't take air to buck air. You're not shoving air up and air coming down. It's got to go to return someplace.

JUDGE KOUTRAS: Okay.

BY MS. HENRY:

Q. Mr. Kuzar, when you say, "You don't take air to buck air," what is your understanding of what the mine management has stated that their intention was, in the way they were ventilating, the way this air was flowing?

A. The way I understood mine management, the air was coming up those other entries, and I assume that it was joining with this return coming across this bleeder system on the inby end. That's what I believe them -- what they were saying.

Q. And do you believe that, with your knowledge and looking at this ventilation plan, with what they were saying, that that would have been an adequate ventilation of that mine, of this area, the way the map is showing it should be ventilated?

A. I would have to see it work that way.

* * * * * * *

Q. And what would be the effect of, as management has stated, their pushing the air up the other way? And I realize I'm using simple terms, but I'm trying to get sort of a layman's understanding here. Of instead of the air going down, the air flowing the way Mr. Brunatti found it flowing?

A. Conditions could change that. It would depend how much they had available for this section, how much air was on this section where they were mining.

There's a lot of things are involved there. What they had going out this bleeder, quantity-wise; how much was going down the split return. There's a lot of things have a bearing on this, what could occur.

* * * * * * *

Q. Why would you consider -- let me ask you this. Would you consider the testimony you've heard today from Mr. Brunatti about the condition from the mine management about the condition, and looking at the plans yourself, would you consider this to be a significant and substantial violation?

A. Yes, I would.

Q. Why?

A Because of what occurred.

Q. Okay, could you explain?

A. The occurrence prior to the inspector getting there, you had a methane build-up in a gob area in that mine. And whether it be -- the chances of that methane being pushed back over this active section would be very slim, being that the fan is over here.

But a change in a barometer -- various things could govern on what that methane did. And it's very unlikely that it would come back over this active section with the fan being over here.

Q. Let me make sure I'm understanding what you're saying. The way the air was flowing, you're saying that the fan placed where it was, it was unlikely that the methane would leave would dissipate? Is that what you're saying?

A. The way that the ventilation that the inspector found with the location of the fan --

Q. Right?

A. -- all right? If they did not have a ventilation control that was mantained to assure that air going up in there, the way the inspector cited it, you would have a methane build-up in this gob.

Q. Okay.

A. And apparently, that's what occurred.

Q. Do you have any reason in your knowledge to believe that the way that air flow was coursing would have contributed to the methane build-up in that area, that caused the withdrawal?

A. No, because I don't know the condition of the entries, the other entry that would be on the far side that would be carrying this methane out of there and diluting it. I don't know the condition of the airways. There's a lot of other things come into play.

* * * * * * *

JUDGE KOUTRAS: The question is, whether or not the air being coursed in the way that Mr. Brunatti thought it was coursed at the time of the violation, whether that had any direct nexus or relationship to the methane accumulation. That's the question. You don't know that?

THE WITNESS: I could have -- I don't know.

JUDGE KOUTRAS: It could have --

THE WITNESS: I wasn't there, but it could have.

The parties agreed that the prior 4.2 methane accumulation occurred in the D-9 standing room regulator area depicted on exhibit G-3(a), in the upper right-hand corner of the sketch where the statement "Regulator may consist of blocks removed from walls as necessary" appears (Tr. 198-199). When asked whether he found some connection with the way in which the air was being directed at the time of the violation, and whether this condition had any relationship to the methane

accumulation, Mr. Kuzar responded "No," "Not outby, I don't, in here, yes" (Tr. 199).

Mr. Kuzar stated that the method used to ventilate the area, as explained by Mr. Endler, up two entries, and then being melded with the air coming out at the top of the area shown on exhibit G-3(a), and then down and out of the return, was a wrong way to course the ventilating air because all of the air pressure should be put on the gob, rather than out the return (Tr. 200). Good ventilation practice calls for keeping the majority of the air pressure on the gob to assure that gases go out the bleeder system to the return, with a limited amount down the return that has to be travelled weekly (Tr. 201-202).

On cross-examination, Mr. Kuzar confirmed that he first reviewed exhibit G-3(a), on Monday prior to the hearing, and was not previously familiar with plan "review 25" when the violation was issued (Tr. 203). He also confirmed that he had no knowledge as to how the prior 4.2 methane accumulation got there (Tr. 203-204). When asked if he knew whether the arrow that is shown at the top of the plan in question is still in the current applicable plan, he responded "I do not know what's in there at the present time. But if this is the bleeder system, it better be there" (Tr. 204).

Inspector Brunatti was recalled in rebuttal and referring to his notes made on the mine map, exhibit G-2, testified as to certain air readings that he took in the area on January 10. In his opinion, based on his air readings, the air that day was coursing through several check curtains and by-passing the gob area. He measured air quantities of 16,948 and 10,505 CFM's at two locations, and 5,000 CFM was ventilating the gob area. In his opinion, 5,000 CFM for gob ventilation is not positive pressure on the gob. The installation of permanent stoppings rather than ventilation curtains, and the adjustment of the regulator to control the air flow, would have put pressure on the gob. Had the gob area been adequately ventilated, the air in the D-9 right butt section would have been coursing down all three entries (Tr. 206-210). He also referred to two additional air readings of 1,250 and 725 CFM's, which indicated that positive pressure was not maintained on the gob (Tr. 212).

In response to further questions, Mr. Brunatti stated that in his opinion there was no positive air flow on the gob on January 10, and that this condition constituted a violation of the law. He confirmed that he did not issue a violation for this condition that day because he detected no

methane over 2 percent. He also confirmed that the air readings he took that day were in compliance (Tr. 216), and that there was a positive air flow coming out of the regulator which is shown on the right-hand portion of the sketch containing his notes, exhibit G-2 (Tr. 219).

Respondent's Rebuttal Testimony

Richard Endler produced copies of several mine examiner and foreman reports reflecting recorded air readings for the D-9 intake and return on January 2, 9, and 10, 1985, indicating 29,880, 6,762, 10,080, 5,875, 26,460, 7,104, and 2,881 CFM's at the locations noted. Mr. Endler concluded that there was "roughly" 13,000 CFM's of air available to ventilate the gob, and while he could not state that all of this air was going through the gob, it was available for that purpose (Tr. 221-223, exhibits O-9 through O-11). He confirmed that the ventilation pattern for the area was the same on January 2 and 9 (Tr. 224). He stated that the gob was being positively ventilated (Tr. 227).

Mr. Endler explained the action taken by the company in response to the 4.2 methane accumulation which was reported on January 9. He stated that checks were installed at the back end area to direct the air coming up the two entries around to flush out the methane. The methane level then decreased to 1.2 percent, and it was then determined that it was safe for the men to go back to work (Tr. 224-225; 230-234). After the methane was flushed out, the checks "were taken down and put it back to the original way. And the methane did stay down" (Tr. 247). Mr. Endler stated that the amount of air necessary to dilute any methane in the gob varies, and that it did so during the week prior to the violation (Tr. 247).

Mr. Endler identified exhibit G-5, as a plan submitted by the company for the pillar mining of rooms off the left of the D-9 area, and that it does not reflect mining on the right-hand side at that point in time. In his view, that plan has nothing to do with this case (Tr. 226).

Findings and Conclusions

The condition or practice cited by Inspector Brunatti as an alleged violation of 30 C.F.R. § 316, and the respondent's approved ventilation plan, is described as follows in section 104(a) "S&S" Citation No. 2255733, issued on January 16, 1985 (exhibit G-1):

> The approved ventilation and methane and dust-control plan was not being complied with in the D-9 area of the mine in that two of the three entries (bleeder) in the 1st Rt Butt area were letting air go inby. The plan depicts only air coming outby from this area. With the ventilation this way the air ventilating D-9 section was escaping out the return instead of putting all the pressure on the gob area thus creating a methane build-up in the back end of the gob.

Inspector Brunatti modified the citation on January 17, 1985, by a "subsequent action" which modified the citation to reflect that it was changed to a section 104(d)(2) Order No. 2255733-01. The modification also included references to a previously issued Order No. 2110076, March 10, 1984, which are incorporated by reference in items No. 14, No. 15, and No. 16 on the citation/order form.

30 C.F.R. § 75.316, provides as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The testimony and evidence adduced in these proceedings establishes that on January 9, 1985, a methane accumulation of approximately 4.2 percent occurred in the D-9 section of the mine. Greenwich notified MSHA and the appropriate state agency of the accumulation, and withdrew the men from the mine. After corrective measures were taken and the methane cleared up, the miners were permitted to go back to work.

As a result of the reported methane accumulation, Inspector Brunatti was contacted at his home by his supervisor and was instructed to go to the mine to examine the affected area.

methane accumulations were detected, and Mr. Brunatti compli
mented mine management for their efforts in clearing up the
methane problem. Mr. Brunatti confirmed the prior methane
accumulation by reviewing the mine examiner's books. He als
made some notations concerning the direction of air flow, ai
velocity, and methane present in the D-9 section, and the
notations were made on an enlarged portion of the mine map
(exhibit G-2). Mr. Brunatti confirmed that he determined th
direction of the air flow by means of a smoke test and by
visual observation. He determined that the air was flowing
up two of the entries, and down the third entry as shown by
the arrows on exhibit G-2.

After completing his examination of the D-9 section on
January 10, 1985, Mr. Brunatti issued no citations and made
no determination as to whether any violations existed at tha
time. He confirmed that he did not have the appropriate ven
tilation plan with him, and also confirmed that he did not a
that time have any knowledge of the mine ventilation system.
He testified that he was directed to go to the mine to deter
mine whether any large accumulations of methane still existe
and that is what he did.

With regard to his notations concerning the direction o
air flow on the three entries in question, Mr. Brunatti test
fied that he had "a problem" with the air direction and con-
sidered it "questionable," but made no determination on
January 10, that it was a violation of the ventilation plan.
He could not recall discussing the matter with mine manage-
ment, and confirmed that he did not know whether the noted
air direction "was right or wrong" at that time.

During the period January 11 and 16, 1985, Mr. Brunatti
was at the mine performing his regular inspection duties, bu
he was not in the D-9 section. He issued the contested cita
tion while at the mine on January 16, and he based the cita-
tion on the notations he made with respect to the flow of ai
on January 10, and his belief that the prior reported methan
accumulation resulted from the misdirected air flow. He con
firmed that on January 16, he did not visit the D-9 section
and did not know what the ventilation was that day. He also
confirmed that he made a finding of "moderate negligence,"
and so indicated by marking the appropriate block on the cit
tion form. He explained that he made this finding out of
consideration of mine management's fine job in correcting th
methane problem, and because he was not totally aware of any
ventilation changes.

Mr. Brunatti confirmed that the decision to issue the citation on January 16, was made after a consultation with his supervisor. His supervisor was concerned about the reported methane accumulation and asked to review his notes. During these discussions, Mr. Brunatti indicated concern that changes were made in the ventilation system to cause the air to flow in the wrong direction, and he believed that mine management had to be involved in any such changes. After further discussion and review of the ventilation plans with his supervisor, it was concluded that the misdirected air as noted by Mr. Brunatti during his mine visit of January 9, constituted a violation of the ventilation plan and section 75.318.

On January 17, 1985, Inspector Brunatti modified the section 104(a) citation to a section 104(d)(2) unwarrantable failure order, but he did not change or modify his moderate negligence finding. The modification was made after further discussions with his supervisor, and Mr. Brunatti admitted that the decision to modify the citation and issue the order was made prior to his going to the mine on January 17.

Inspector Brunatti testified that he did not consider the action of Greenwich with respect to the violation to be willful, nor did he consider it to be the result of indifference or a serious lack of reasonable care on the part of Greenwich (Tr. 73-74).

In its posthearing brief, Greenwich argues that the contested section 104(d)(2) order is invalid because it was based on an investigation of a past methane accumulation incident rather than a condition or practice detected by Inspector Brunatti during the course of an inspection. In support of its argument, Greenwich cites the following cases in which six Commission Judges decided the issue as argued by Greenwich: Westmoreland Coal Company, Docket Nos. WEVA 82-34-R, et. al., (May 4, 1983), unreported, (Judge Steffey); Energy Mining Corporation, 7 FMSHRC 1908, 1919 (Nov. 1985) (Judge Lasher); Southwestern Portland Cement Company, 7 FMSHRC 2283, 2292 (Dec. 1985) (Judge Morris); Nacco Mining Company, 8 FMSHRC 59 (1986), review pending (Chief Judge Merlin); Emerald Mines Corporation, 8 FMSHRC 324 (1986), review pending (Judge Melick; White County Coal Corporation, 8 FMSHRC 921 (June 9, 1986) (Judge Melick; and Greenwich Collieries, 8 FMSHRC 1105 (July 14, 1986) (Judge Maurer).

Greenwich points out that the inspector was dispatched to the mine to look into a methane accumulation in the D-9

area of the mine which occurred on January 9, and which was reported by Greenwich. Upon his arrival at the mine on January 10, the inspector visited the D-9 area, but issued no violations. Subsequently, on January 16, when he issued the section 104(a) citation, the inspector did not reenter the D-9 section before writing the citation. Still later, on January 17, the inspector modified the citation to a section 104(d)(2) order, and he did so on the basis of a conversation with his supervisor without reentering the D-9 section. The decision to issue that order was made prior to the inspector's arrival at the mine on January 17.

Greenwich points out further that the methane accumulation which occurred on January 9, 1985, was never observed or detected by Inspector Brunatti, and that it was dissipated on January 10, when he entered the D-9 section. Greenwich concludes that since no methane accumulation was in existence at the time the initial section 104(a) citation and the subsequent modification to a section 104(d)(2) order took place, the order was invalid and should be dismissed.

Citing United States Steel Corporation, 6 FMSHRC 1423 at 1437 (June 1984), where the Commission held that an unwarrantable failure to comply may be established by showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care, Greenwich asserts that there is no evidence in this case to support an unwarrantable failure finding. In support of this conclusion, Greenwich relies on Inspector Brunatti's findings of "moderate negligence" with respect to the citation and order, and his testimony that he did not consider the alleged violation to be due to "indifference, willful intent, or a serious lack of reasonable care" on the part of Greenwich.

With regard to the alleged violation of section 75.316, Greenwich submits that MSHA has failed to establish by any credible evidence that Greenwich violated its ventilation plan. Greenwich asserts that the testimony of foreman Endler clearly indicated that the ventilation was in compliance with plan review No. 25 which was in effect at the time of the citation. Greenwich points out that Mr. Endler, using various exhibits, clearly demonstrated that government Exhibit 3-A was the same as operator's Exhibit 4. He indicated that operator's Exhibit 4 showed main intake air coming up the right-hand entry, reduced air flow coming up the belt entry, and return air going down the left-hand entry shown in Exhibit 4. He further testified that the ventilation demonstrated in that exhibit was the same ventilation as cited by Inspector

Brunatti as not being in compliance with the ventilation plan. The citation, later modified to an Order, was ultimately terminated when Greenwich submitted a print to MSHA which showed ventilation going in the direction required in the citation and order of January 16 and 17, respectively. Greenwich submits that no such submission to MSHA would have been necessary had the original plan required ventilation in the D-9 area as interpreted by Inspector Brunatti. Hence, Greenwich submits that MSHA failed to show a violation of the ventilation plan.

With regard to Mr. Brunatti's allegations that the air ventilating the D-9 section was escaping out the return instead of putting all the pressure on the gob area, thus creating a methane build-up at the back end of the gob, Greenwich asserts that the testimony by foreman Endler clearly revealed there was a positive flow of air on the gob in the D-9 area. Greenwich points out that Mr. Endler's testimony was based upon air readings taken in the area on January 2 and 9, and his personal observations of the area on January 9, which indicated a positive flow of air on the gob in the D-9 area. Greenwich concludes that MSHA has failed to prove that all available air positive pressure was not put on the gob, thereby creating a methane build-up in the back end of the gob.

In her closing oral arguments, MSHA's counsel relied on the testimony of Inspector Brunatti and Supervisory Inspector Kuzar to support a violation of the ventilation plan. With regard to Mr. Kuzar's testimony, I have given it little or no weight. Mr. Kuzar confirmed that he has no supervision over the No. 1 Mine, was not in it when the citation was issued, and that he last visited it in 1982. His testimony in support of the violation is based on his familiarizing himself with plan review No. 25 during the hearing, and MSHA conceded that he had no personal knowledge as to what prompted Inspector Brunatti to issue the citation. When asked about any hazard involved in ventilating the area cited by the inspector in the manner in which he claimed it was being ventilated when the citation issued, Mr. Kuzar responded "I wasn't there. I don't know."

When asked about the manner in which Greenwich claims it was ventilating the area in question, Mr. Kuzar stated that he would have to observe it operating before he could comment on it. When asked about the effectiveness of the air flowing in the direction that Mr. Brunatti claimed it was flowing, on January 9, Mr. Kuzar responded that "conditions could change that" and that other variables have to be considered. When asked whether he had any reason to believe that the air flow

as found by Inspector Brunatti could have contributed to the reported methane build-up in the D-9 area, Mr. Kuzar responded "No, because I don't know the condition of the entries * * * and airways, * * * and there's a lot of other things that come into play." When directly asked whether the air flow as found by Inspector Brunatti had any direct relationship to the methane accumulation, Mr. Kuzar replied "I don't know. I wasn't there, but it could have."

MSHA's counsel agreed that review 25 is the applicable plan in effect at the time the citation was issued. However, counsel took the position that exhibit G-3, which is "review 26," while not the official plan that was in effect at the time in question, "makes it a little bit clearer," and that the three arrows in the upper left-hand corner of page two of "review 26" basically describe the direction of air coming down all three entries (Tr. 141-142). Counsel asserted that there is no dispute that the air was flowing in the direction claimed by Mr. Brunatti, and that the disagreement lies in the fact that the company believes that the direction of the air was in compliance with the applicable plan, and that MSHA believes that the direction of the air was out of compliance (Tr. 142). Counsel agreed with Mr. Brunatti's interpretation that the direction of air should have been down all three entries, rather than up two and down the third (Tr. 145, 152).

When asked why the single arrow shown at the top left-hand corner of "review 25," exhibit G-3(a), does not curve around and come down the entry, MSHA's counsel responded "it is MSHA's position that this is the only way, if the air is going that way, the only way you can ventilate the mine * * * is to get the air out again, is to go back down--" (Tr. 154). Counsel asserted that the air should have gone down all three entries as shown in the plan print submitted to abate the order, exhibit O-8 (Tr. 162).

I take note of the fact that the citation issued by Inspector Brunatti fails to include any reference to the particular ventilation plan provisions allegedly violated in this case. I also note the fact that while in the D-9 section on January 10, the inspector did not have the ventilation plan with him, and he admitted that he was not at that time a ventilation specialist and had no knowledge of the mine ventilation system. His subsequent opinion that the plan had been violated was based on a review of the ventilation plans and his notations made on a portion of the mine map (exhibit G-2) while he was on the section on January 10.

Inspector Brunatti's conclusion that the ventilation plan was violated was based on his findings made on January 10, that the air flow was misdirected in two of the three entries on the D-9 section as noted on the face of his citation. He found that in two of the entries the air was travelling inby, when the ventilation plan depicted the air flowing outby in all three entries. Mr. Brunatti also relied on his notes made on January 16, which reflected that Greenwich's safety representative and mine foreman Endler stated that the direction of air flow as he found it on January 10, was the way it was depicted on the ventilation plan, but contrary to the way Greenwich's engineer submitted it for approval.

Mr. Brunatti testified that the applicable ventilation plan provision appears on the second page of exhibit G-3, at the upper left-hand corner. The plan depicts three double arrows showing the air travelling down all three of the entries after exiting at the point labeled BE# 58, and out the return. These are the same entries noted by the inspector when he made his notations on the mine map (exhibit G-2), on January 10, showing the air travelling up two entries but down the third one. The plan is labeled "Review No. 26," and it reflects that it was submitted on February 15, 1985, and revised on May 31, 1985, after the citation was issued.

Mr. Brunatti also testified that ventilation plan Review 25, dated August 1, 1984 (exhibit G-3(a)), is equally applicable in this case and that it in no way changed the requirements depicted in plan Review No. 26. However, he conceded that plan Review No. 26 was not in effect at the time the citation issued, but that plan Review No. 25 was (Tr. 79-80, 87). MSHA's counsel asserted that Plan No. 26 was introduced to clarify Plan No. 25 and that it was a "more helpful drawing of what was indicated in Government Exhibit G-3(a), and that no changes were made in the plans (Tr. 116-117).

Greenwich's counsel asserted that the critical issue in this case focuses on the interpretation placed by Inspector Brunatti on the significance of the double-headed arrow depicted at the upper left-hand corner of ventilation plan Review 25, exhibit G-3(a), the ventilation plan which was in effect at the time the citation was issued on January 16. Counsel argued that review 25 and exhibit O-2, which is part of a print submitted at the time review 25 was submitted, consistently show the direction of air flow going up two entries and down the third entry. Counsel argued that these exhibits show the direction of intake air coming in the

right-hand entry, reduced air coming up the low-low belt entry, and return air coming out the left-hand entry (Tr. 124, 139).

After careful review of all of the testimony and evidenc adduced in these proceedings, I cannot conclude that MSHA has carried its burden of proof in establishing a violation of th ventilation plan by a preponderance of the credible evidence in support of its case. The ventilation plan provision relie on by the inspector in support of his initial citation (revie No. 26), was not in effect at the time it issued, and the fac that Greenwich's engineering department may have submitted a subsequent revision depicting the direction of air down all three entries is irrelevant. Any suggestion by MSHA that the applicable plan No. 25, which was in effect at the time the citation issued, must be interpreted to show the direction of air down the three entries, as clearly shown in review No. 26 is rejected.

I further find that Greenwich's testimony and evidence is more credible, and that it has established that it was following the applicable ventilation plan requirements of ventilation review plan No. 25, August 1, 1984, as depicted in exhibits G-3(a) and O-2. Those exhibits clearly and consistently show the air flow going up two entries and down the third, precisely as found by the inspector when he made his notes on January 10, while on the D-9 section.

With regard to MSHA's allegations that Greenwich's failure to maintain positive air pressure on the gob contributed to the methane build-up at the back of the gob, Inspector Brunatti testified that when he tested the air in the D-9 area on January 10, he found quantities of 16,948 and 10,505 CFM's at two locations, and 5,000 CFM's ventilating the gob area. In his opinion, 5,000 CFM's is not positive pressure on the gob. However, Mr. Brunatti confirmed that he issued no citation on January 10, for lack of positive air pressure on the gob even though he considered this condition to be a violation of the law. He explained that he issued no violation because he detected no methane over 2 percent. He also testified that the air readings he took on January 10, were in compliance and that there was in fact a positive air flow coming out of the regulator.

Mine foreman Endler produced copies of several mine examiner and foreman reports reflecting recorded air readings for the D-9 intake and return on January 2, 9, and 10, 1985, indicating 29,880, 6,762, 10,080, 5,875, 26,460, 7,104, and 2,881 CFM's at the locations noted. Mr. Endler concluded

that there was "roughly" 13,000 CFM's of air available to ventilate the gob, and while he could not state that all of this air was going through the gob, it was available for that purpose. He confirmed that the ventilation pattern for the area was the same on January 2 and 9, and that the gob was being positively ventilated. He also confirmed that the accumulated methane in question was flushed out after two checks were installed at the back end of the gob and then taken down after the methane was reduced to 1.2 percent. Inspector Brunatti agreed that as long as the majority of air is coursed to the gob, the ventilation is ideal.

I cannot conclude that MSHA has established that Greenwich failed to maintain positive pressure on the gob, thereby resulting in the build-up of methane. Aside from Inspector's Brunatti's opinion that this was the case, I can find no credible facts to support his speculative opinion. In fact, Mr. Brunatti admitted that he issued no citation for these alleged conditions, was unaware of any methane build-up at the back end of the gob from January 10-17, found less than 2 percent methane on January 10, while on the D-9 section, all of his air readings were within MSHA's requirements, and he found positive air flow coming through the regulator. In addition, he conducted no inspection of the D-9 section subsequent to his visit there on January 10, when he made some notes on a portion of the mine map, and he admitted that he had no knowledge of the ventilation conditions on January 16.

With regard to Greenwich's arguments concerning the modification of the contested citation to an unwarrantable failure order, I agree with the rationale of the cases cited in support of the proposition that a section 104(d)(2) order may only issue upon an inspection of the mine. However, on the facts of this case, even if I were to find a violation of section 75.316, I would vacate the inspector's unwarrantable findings and modify the order to a section 104(a) citation, and I would do so on the basis of a total lack of credible evidence or facts to support any unwarrantable failure on Greenwich's part. As noted earlier, Inspector Brunatti candidly admitted that he did not consider Greenwich's actions to be willful, or the result of indifference or a serious lack of reasonable care.

ORDER

In view of the foregoing findings and conclusions, Greenwich's contest IS GRANTED, and the contested section 104(d)(2) Order No. 2255733-01, Janury 17, 1986, citing an

alleged violation of 30 C.F.R. § 75.316, IS VACATED, and MSHA's civil penalty proposal IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 16 1986

BETHENERGY MINES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 86-287-R
	:	Citation No. 2695988; 8/20/86
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Livingston Portal 84

ORDER OF DISMISSAL

Appearances: R. Henry Moore, Esq., Rose, Schmidt, Chapman & Hasley, Pittsburgh, Pennsylvania, for Contestant;
Robert M. Cohen, Esq., Office of the Solicitor, Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Melick

Contestant requests approval to withdraw its Contest in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 17 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DuWAYNE SCHAFER, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 85-89-D Glenharold Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor
U.S. Department of Labor, Denver, Colorado,
for Complainant;
Gregory Lange, Esq., Richardson, Blaisdell,
Isakson and Lange, Hazen, North Dakota,
for Respondents;
Deborah Fohr Levchak, Esq., Office of the General
Council, Basin Electrical Power Cooperative,
Bismarck, North Dakota,
for Respondents.

Before: Judge Lasher

This proceeding was initiated on May 20, 1985, by the fili of a discrimination complaint by William E. Brock, Secretary of Labor, on behalf of DuWayne Schafer (herein "Schafer"). The Secretary's complaint, as twice amended, alleges that Schafer w reprimanded in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (Supp. V., 1981)(herein "the Act") and seeks as a remedy therefor one day's back pay with interest, and correction of Schafer's employment record including removal of the reprimand. In addition, the Secretary prays that a $2,000.00 civil penalty be assessed against Respondent pursuant to Section 110 of the Act.

PRELIMINARY FINDINGS

The preponderant reliable and probative evidence, based on the testimony and documentary evidence received at the formal adversary herein and pleadings, establishes the following:

The Glenharold mine, a large surface coal mine (T. 366), in November, 1984, and at all times material herein, while owned by Respondent Basin Cooperative Services (herein "Basin") was operated, supervised and controlled by Respondent Consolidation Coal Co. (herein "Consolidation"). At the hearing, it was conceded that both Respondents are subject to the Act and the Commission's jurisdiction. Since Consolidation operated, supervised and controlled the mine (T. 286) it was the "operator" at the times pertinent herein, and as the record demonstrates, directly responsible for any violation of the Act by its management personnel which occurred during the period in question. 1/ The superintendent of the mine in November, 1984, and at all times material herein was Marvin Suess, an employee of Consolidation (T. 416-418).

In November 1984, Schafer, an employee of Consolidation, was a heavy equipment operator (sometimes referred to as a "blade operator"), who regularly operated a Cat. No. 16 Motor Grader, referred to in the record as the "G-4". At the times pertinent here, the Glenharold Mine utilized three motor graders ("blades"); the one directly involved in this proceeding was a standby for use when the other 2 were being repaired and is referred to in Respondents's mining jargon as the "G-3"; it is similar to that depicted in Exhibit 17 (T. 31-34). The G-3 has disc brakes and can travel up to speeds of 7-8 MPH in fourth gear (T. 123) and 28 MPH in eighth gear.

During the relevant time period the mine was operated around the clock - three 8-hour shifts; the G-3 blade was subject to use on each shift.

On November 12, 1984, Schafer's usual G-4 blade was being repaired and his assigned task was to operate the G-3 grader on the afternoon shift (4 p.m. to midnight) doing reclamation work on the surface ("top") of section 5 of the mine consisting of removing overburden and dumping it in an area shown as the "spoils" area on the depiction marked Exhibit 3-A. This required him to operate his diesel-powered grader along a mile-long inclined roadway (T. 45, 59, 191, 401-402, 414) between the highwall on the south side of the pit and the spoils area. Other vehicles, such as scrapers, pickups and haulage trucks, were also traveling along the roadway. (T. 36-46, 58). It was very dark (T. 46). There was a 4-block distance where there were no berms with a 30-foot straight-down drop if the blade had gone over the side (T. 55-57).

1/ 30 U.S.C. § 802(d); Consolidation Coal Company v. Secretary (4th Cir., unreported decision; March 13, 1986).

At the beginning of his shift on November 12, Schafer performed his usual safety check of the blade and noticed some lights thereon were not working and that a mirror was missing. He called his foreman, Dean Bray (T. 61, 369) who sent out an electrician who fixed the lights and brought out a mirror which Schafer installed. When the electrician left, Schafer operated the blade for about 3 hours (T. 61, 62) and noticed "the brakes were not holding well" (T. 46, 136). The brakes were getting worse each time he used the brakes, according to Schafer (T. 46-47). Schafer described the problem as follows:

"A. Well you would go to step on the brakes and it would take awhile before they would grab and then it wouldn't stop like it should. Normally if you slam on the brakes will stop.

X X X X X X X

A. You should be able to slide the tires on it.

Q. What does that mean?

A. Lock up the brakes so the tires don't go around on it. You should be able to to stop down on the brakes and the tires lock right up, they don't go around.

X X X X X X X

A. Well until the tires stop -- from the time you step on the brakes until the tires stop turning, shouldn't be more than one to two seconds.

X X X X X X X

Q. Now on November 12, what were the problems with the brakes that you experienced?

A. They had -- I noticed that they were considerably worse so I run it that way for a part of the shift.

Q. What do you mean by considerably worse, what happened when you stepped on the brakes?

A. It was -- the pedal would go to the floor and it was taking considerably longer until they would grab. It was taking approximately five seconds from the time you'd step on the pedal until they would grab, and then you would or coast to a stop, it wouldn't stop it like -- you know, or lock up the wheels or anything. It would just kind of coast to a stop.

Q. How far did you go from the time you stepped on the brakes until the time the equipment stopped -- how much time?

A. I would say on a flat surface with it warmed up and everything, from the time they would actually start grabbing -- it'd be five seconds from the time you'd step on the brake approximately till they would grab; from the time it would grab until it would stop, a minimum of 20 feet -- minimum.

Q. That was on a level surface?

A. Right, in fourth gear, which is approximately seven miles an hour. I don't really know for sure, that's just my guess.

Q. How fast were you traveling on that particular evening

A. Anywheres from -- depending on what type of situation I was in, anywheres from second to fourth gear while I was blading.
Q. And do you have any ideal how many miles per hour that would be?
A. Well like I say, fourth gear I think is approximately seven miles an hour, seven to eight." (T. 47-49).

On November 12, Schafer operated the G-3 from about 5 p.m. to 8 p.m. during which time the last 4 transmission gears, numbers 5 through 8, became inoperative and a ball joint on the steering axle broke. (T. 62, 137). At approximately 9 p.m. he tagged out the G-3 (T. 65, 66 171,; Ex. 8) and took it to the repair shop after calling the shift foreman, Dean Bray and telling him that the transmission was out, that the ball joint had broken and that the brakes needed to be adjusted (T. 65, 138, 139). Bray told him to take it to the shop. At the shop, Schafer reiterated to the shop foreman for that shift, Rich Schneider, the three items which needed repair.

Tagging out equipment is an equipment operator's means of alerting management that the equipment is unsafe (T. 413). Schafer's safety concerns as to the brakes were thus communicated to management personnel both orally and in writing.

At a speed of 7 MPH (approximately the top speed of the G-3 with the top 4 gears of the transmission out) the G-3 would travel 20-40 feet over a 5-second period after the brakes were applied before it would stop in some of the conditions Schafer was operating in on November 12 depending on whether the roadway was flat or inclined (T. 69, 140, 141). Part of the area of roadway Schafer was working was inclined (T. 43-45, 58-59, 63, 68, 191, 195, 198-200).

Consolidation's Tag-out Procedure, reflected in a 2-page memorandum from "Mike Quinn" to "all employees" dated January 8, 1981, as a "Safety Topic for the week of January 19, 1981" (Ex. 4), provides as follows:

"PROCEDURE FOR TAGGING OUT DEFECTIVE EQUIPMENT"

In order to insure that defective equipment is not operated and that equipment is not needlessly taken out of service, the following procedure should be followed when placing a "DO NOT OPERATE" tag on a piece of equipment.

1. Any individual can tag out a piece of equipment. However, the individual should know enough about the machine to determine if it is safe.

2. If you place a "DO NOT OPERATE" tag on equipment, you must:
A. Immediately inform your foreman that you have done

operated.
C. Put your name, the date, and the time on the tag.
D. Turn in a safety maintenance request and note that the equipment has been tagged out of service.

3. To remove a "DO NOT OPERATE" tag:
A. Anyone can remove the tag if the defect has been fixed. It should be noted on the copy of the safety maintenance request sheet that it has been fixed.
B. The tag should not be removed until the defect is fixed or it is determined by one of the following peop that the defect does not merit taking the equipment ou of service.

1. Safety Director
2. A member of the Safety Committee
3. The individual that placed the tag
4. A Foreman
   a. If a Foreman or the Safety Director removes th tag prior to the repair of the defect, an explanation should be given to the person who tagged the equipment out or a member of the Safety Committee. If there is no mutual agree ment that the tag should be removed, the issue shall be considered a Health and Safety Dispute under Article III, Section (O) of the Contract

C. If the tag is removed prior to repair of the defect it should be noted why and by whom on the safety maintenance request.

D. In some instances the use of a defective piece of equipment is permissible if it is done under limited circumstances and with an awareness of the defect. If this becomes necessary, the circumstances and precautions taken should be noted. An Example: The brakes don't work on the polecat. It is parked by bucket hard ware that needs to be loaded onto the two ton truck. Without moving the truck someone blocks the wheels and used the hoist.

Company policy effective January 19, 1981.

s/ Marvin R. Suess
MARVIN R. SUESS
SUPERINTENDENT

The frontside of the tag (Ex. 8) which Schafer placed on th steering wheel of the G-3 at the time provided as follows:

"DANGER
EQUIPMENT NEEDS REPAIR
SIGNED BY S/ DuWayne Schafer
DATED 11-12-84

The back side of the tag provided:

"DANGER
DO NOT REMOVE THIS TAG

Left steering cylinder has broken ball joint

Brakes need adjusting

SEE OTHER SIDE" (Note: The capitalized wording reflects the standard printed portion of the tag form; lower case is the part filled in by Schafer in his handwriting)

Subsequently, in handwriting, the word "Repaired" was put i by Lee Brown, repair shop foreman, behind the word "ball joint" and behind the word "adjusting" the following note was made: "Miles Dochtor checked out and they seemed safe to him. LB. 2/ 11-13-84"

Miles Dochtor's testing of the brakes was performed on a level surface (T. 338). Miles Dochtor's report back to Lee Brow was that there was a "slight pause" on the brakes, "maybe a couple of seconds or something". He did tell Mr. Brown how fast he had driven the G-3. Dochtor indicated he thought the brakes were safe and also that he believed the G-3's brakes needed repair (T. 339, 340). Because Brown thought the G-3 was needed, he did not then repair the brakes but sent it back out for operation (T. 340), removed the tag and gave it to his supervisor, Merle Anderson (T. 341, 391). According to Mr. Brown it "very seldom" happens that he removes a tag before all repairs are completed (T. 342). In fact, the only tag Brown had even taken off a machine was Schafer's first tag on the G-3 (T. 351). This constitutes a change in Respondent's procedures which I fin Schafer could not have anticipated.

2/ The hand written initials of Lee Brown, the repair shop foreman on the next shift, i.e. midnight to 8 a.m. on November 13, 1984 (T. 67, 306). Miles Dochtor was a repair shop mechanic (T. 86, 334). Neither Lee Brown or Dochtor were members of the Safety Committee (T. 85, 86).

After leaving the G-3 blade in the shop for repair, Schafe operated a scraper for the rest of his November 12 shift (T. 68, 387).

On the following day, November 13, 1984, Schafer returned t the mine to commence work on the 4 p.m. to midnight shift. The G-3 was at the job site and Schafer performed his usual safety check, 3/ drove the G-3, and "realized that the brakes were the same as they had been the night before." (T. 68, 142). He called the shop foreman for that shift (T. 384), Rich Schneider, on his radio and asked him if there was any plan to repair the brakes. Schneider said that they didn't want to repair it until after repairs on the G-4 were completed (T. 68, 477, 478). Schafer asked what happened to the tag he had put on it the nigh before and Schneider said he knew nothing about it (T. 68-70, 111, 146). Schneider didn't say, and Schafer did not know, when the G-4's repairs were due to be completed (T. 146). Management did have "plans" to repair the G-3's brakes (T. 147, 277) but di not want to make such repairs until after the G-4's repairs were completed (T. 68, 86, 365, 384-386, 477-478, 527-528) which was anticipated to be on Wednesday, November 14 (T. 384).

Schafer than called Dean Bray, his foreman, at approximatel 4:30 p.m. and asked him to bring him another tag for the blade. Bray said nothing but after a while he came to where Schafer was and asked Schafer to take a pickup and go fuel a light plant. Bray told Schafer he would get him a tag later. Schafer then fueled up the light plant, and found a tag in the pickup which h then, about 5 p.m. (T. 172, 173), put on the G-3 blade between 7 p.m. and 8 p.m. (T. 109) Bray asked Schafer if the G-3 was in too bad shape to take to the repair yard. Schafer said he could bring it there (a distance of 5 or 6 miles) in slow speed (T. 70-72, 389, 390). Bray did not mention opposing putting a tag o the blade at that time (T. 70-72) or that it wasn't company policy to put a second tag on the machine (T. 72). When Bray arrived for work on November 13, he did not ask anyone if the blade had been repaired the night before, but "assumed that it had been taken care of or it wouldn't be out there again" (T. 403-404).

The tag which Schafer put on the G-3 on November 13, 1984 (Ex. 9) was on the same printed tag form as Ex. 8 and provided o the front side:

"DANGER
EQUIPMENT NEEDS REPAIR
SIGNED BY s/ D.M. Schafer
Date 11-13-84
7:00 p.m. "

3/ Employees were required to check their equipment before operating it (T. 418-419).

The rear side of the tag provided:

DANGER
DO NOT REMOVE THIS TAG
Brake [sic] do not
operate properly
Do not grab right
away or hold very well. 4/
SEE OTHER SIDE"

Schafer's reason for putting the second tag on the G-3 was that he "felt that it was still as unsafe as it was before to operate and they had done nothing about it to make it any better." (T. 73). Schafer was aware at the time that the tags prevented others from using the equipment (T. 73). If the operator of a blade felt it was unsafe, the method used to alert management was placing a tag on it (T. 413, 458).

At approximately 9 p.m., Schafer took the G-3 to the repair shop and went into the "warehouse" where four foreman were sitting having coffee, Rich Schneider, Larry Klinsworth, Dean Bray and Kenny Redka, and told them that the "next time somebody takes that tag off -- some foreman takes that tag off, some foreman is going to be in trouble." (T. 76). 5/

At this point in time, no foreman or anyone in management had told Schafer why the brakes had not been repaired, why the tag had been removed, who had removed it (T. 77, 82, 104, 108-112, 308-310, 341, 358, 359, 463, 476, 477, 506-507) or given any explanation other than Schneider's statement to him that they did not want to fix the G-3 until the G-4's repairs had been finished. (T. 77, 82, 308-309, 312, 527). As noted previously, the G-3's brakes were scheduled for repairs in "a day or so" thereafter, after the G-4 blade came out of the repair shop (T. 308, 312-313).

Schafer also had not been advised: (1) that a member of the Safety Committee had reviewed the G-3's brakes as required by Article III, Section (i) of the union contract (Ex. 19, T. 81, 82, 409), the pertinent portion of which is set forth subsequent-

4/ The wording of the handwritten part of this tag filled in by Schafer does not reflect that he was aware that the first tag had been removed by management or that management had checked the brakes and found them satisfactory; nor does its tenor show rancor or reflect any knowledge of any events concerning the G-3 after he left it at the repair shop the previous evening.

5/ This is Schafer's account. According to Dean Bray, the only party to the conversation who testified besides Schafer, Schafer said that if any of the foreman present had removed the tag it "would be" their "ass" (T. 396). On this limited issue I credit Bray's account as being the more likely in view of the overall circumstances and Schafer's emotional state at the time.

ly herein. Nor had Schafer been advised (2) that the G-3 was safe to operate in particular areas of the mine or under specified conditions (T. 77, 82, 308-311, 359, 407, 408, 464, 507).

In this connection it should again be noted that Respondent's own procedure for tagging out Defective Equipment (Ex. 4) provides:

"The tag should not be removed until the defect is fixed or it is determined by one of the following people that the defect does not merit taking the equipment out of service.

1. Safety Director
2. A member of the Safety Committee
3. The individual that placed the tag
4. A Foreman

A. If a Foreman or the Safety Director removes the tag prior to the repair of the defect, an explanation should be given to the person who tagged the equipment out or a member of the Safety Committee. If there is no mutual agreement that the tag should be removed, the issue shall be considered a Health and Safety Dispute under Article III, Section (O) of the Contract." (emphasis added)

After Schafer took the G-3 to the shop, he asked Dean Bray who had removed the first tag. Bray said that he wasn't sure, and told Schafer to eat his lunch (T. 407) and they would talk about it after lunch. 6/ Bray then discussed the matter with Rich Schneider (T. 408) and "tried to find out just exactly what had happened on graveyard shift when they fixed it the night before" (T. 391). Schneider told him that foreman Lee Brown had removed it and that Brown and Dochtor had "checked it out." Bray then requested Schafer to run the G-3 since "there wasn't any real hazard if he was blading and doing his job", and asked him if "he didn't think he could run it for one more shift and then by the next day G-4 would have been ready." Schafer refused to operate it. (T. 391, 409). If the G-4 had not come out of the repair shop at that point, it was management's "intention" to "continue to use" the G-3 (T. 527-528).

During the lunch break, and before Bray asked Schafer to run the G-3 for one more shift, Bray and Schneider tested the G-3's brakes while running the G-3 in 4th gear and found that there was

6/ At this point, according to Mr. Bray, he "had no reason" to believe the condition of the G-3's brakes "were any other" than what Schafer told him they were (T. 407-408), that is, that the brakes were not safe to operate (T. 408).

a 2 or 3 second hesitation before the brakes grabbed (T. 392) with the G-3 traveling 10 to 20 feet before coming to a stop (T. 393-395, 412). Mr. Bray could render no opinion how far the G-3 would have traveled after application of the brakes had there been no "hesitation" problem (T. 395). Again, there is no evidence in the record that Schafer was told at any time, that the G-3 was considered safe to operate in certain specified areas.

The conversation with Schafer after the lunch break, at approximately 9:30 p.m. (T. 78, 83), was initiated when Mr. Bray came up to Schafer and told him that "Schneider and I looked at that blade and we decided the brakes aren't that bad and so you'll have to run it" (T. 78, 83, 181-183). Schafer asked Bray if anyone from the safety committee had looked at the G-3, Bray said "no, Rich and I looked at it." Schafer said they needed someone from the safety committee to look at it and that this had been standard procedure in the past (T. 79, 80). Bray told Schafer that he didn't "need any member of the safety committee, that if a foreman tells you that its safe to operate, you have to operate it" (T. 83). Schafer was familiar with the union contract (Ex. 19) as he had been a member of the safety committee for 2-3 years and had been chairman of the safety committee for approximately one year. Schafer's understanding of the contract safety procedure was as follows:

> "The procedure was that if the safety committee decided -- according to the contract, if the safety committee decided it was okay, you should run it; if you didn't, then you still have the option of calling in MSHA to check it out. If at that point MSHA decided it was safe to run anyway, then you were subject to reprimand. If they decided it was unsafe, then they would have to repair it." (T. 80).

No member of the safety committee was advised or given an explanation by management why the first tag was removed (T. 79-82, 84, 409).

At the beginning of Lee Brown's shift on November 14th (at approximately midnight), Schafer conversed with Brown about the G-3. This occurred after Schafer's shift on November 13 and after Schafer had put the second tag on the G-3. Brown advised Schafer that Miles Dochtor had checked the brakes (after the first tag) and that Miles had said the G-3 was safe to operate. Brown had not called a member of the safety committee to check the G-3 at this point (T. 347).

When he arrived for work on the midnight to 8 a.m. shift (the shift following Schafer's) on November 14, 1984, Lee Brown noticed the G-3 was in the shop again with a tag on it and he and Mark Winn, a pit foreman, both test drove the G-3 (T. 343). Both drove the G-3 on the haul road but again on flat level surfaces. Neither were safety committee members. There again was "a slight

before they stopped the G-3, allowing the G-3 to travel more th 10 feet (T. 343-345). The pause or delay in the brakes grabbin was not a "common" symptom of brake wear (T. 363).

On November 14, after these tests by Brown and Winn, the brakes on the G-3 were repaired (T. 348) by replacing all the seals and discs thereon (T. 362). After such repair, the old brakes are thrown away (T. 364). In the case of the G-3 some o the brake pads which were removed were seen to have completely worn away (Tr. 365). Mine superintendent Suess was told that t brakes "were worn but they weren't totally out"(T. 531).

Schafer's understanding of the safety procedure was based Article III, Section (i) of the union contract (Ex. 19) which i entitled "Preservation of Individual Safety Rights" (T. 81). I provides:

> "(1) No employee will be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expect to cause death or serious physical harm before such condition or practice can be abated. When an employee in goo faith believes that he is being required to work under suc conditions, he shall notify his supervisor of such belief. Unless there is a dispute between the employee and management as to the existence of such condition, steps shall be taken immediately to correct or prevent exposure to such condition utilizing all necessary employees, including the involved employee.
>
> (2) If the existence of such condition is disputed, the employee shall have the right to be relieved from duty on the assignment in dispute. Management shall assign such employee to other available work not involved in the dispute and the employee shall accept such assignment at the higher of the rate of the job from which he is relieved an the rate of the job to which he is assigned. The assignme of such alternative work shall not be used to discriminate against the employee who expresses such belief. If the ex istence of such condition is disputed, at least one member of the Mine Health and Safety Committee shall review such condition with mine management within four (4) hours to de termine whether it exists.
>
> (3) If the dispute involves an issue concerning compliance with federal or state mine safety laws or mandatory health or safety regulations, the appropriate inspection agencies shall be called in immediately and the dispute shall be settled on the basis of the inspectors' findings, with bot parties reserving all rights of statutory appeal. Should

the federal or state inspectors find that the condition co plained of requires correction before the employee may return to his job, BCS shall take the corrective action indicated immediately. Upon correction, the complaining employee shall return to his job. If the federal or state inspectors do not find a condition requiring correction, the complaining employee shall return to his job immediately.

(4) For disputes not otherwise settled, a written grievanc may be filed, and the dispute shall be referred immediatel to arbitration. Should it be determined by an arbitrator that an abnormally unsafe or abnormally unhealthy conditio within the meaning of this section existed, the employee shall be paid for all earnings he lost, if any, as a resul of his removing himself from his job. In those instances where it has been determined by an arbitrator that an employee did not act in good faith in exercising his rights under the provisions of this Agreement, he shall be subjec to appropriate disciplinary action, subject, however, to h right to file and process a grievance.

(5) None of the provisions of this section relating to compensation for employees shall apply where BCS withholds or removes an employee or employees from all or any area of a mine, or where a federal or state inspector orders withdrawal or withholds an employee or employees from all or any area of a mine. However, this section is not intended to waive or impair any right to compensation to which such employees may be entitled under federal or state law, or other provisions of this Agreement.

(6) The provisions of this section shall in no way diminis the duties or powers of the Mine Health and Safety Committee." (Emphasis supplied)

After Schafer finished his lunch on November 13, Bray assigned Schafer to operate a scraper (T. 183) and Schafer did through the end of the shift. At the end of the shift, another foreman, Mark Wynn, advised Schafer that it was Lee Brown, repa shop foreman (T. 84, 305) for the shift following Schafer's, wh had removed the first tag. Schafer then spoke to Lee Brown and asked him what he was doing taking the tag off. Brown told him that he and Miles Dochtor had checked out the G-3 and decided i was good enough to run. Brown indicated that the brakes could not be fixed by "adjusting" them and that the brakes had to be taken apart and new discs put in, and that they needed the G-3 until the other blade was repaired. Schafer had not seen it occur before that a foreman simply removed a tag and he had not previously seen Respondent's tag-out procedure (Ex. 4) (T. 87, 88, 93, 150, 156) nor had another miner, Edwin Whetham (T. 214) The only procedure Schafer was aware of was Article III, Sectio (i) of the union contract (T. 95).

The hazards which were posed by operating the G-3 with defective brakes in the area where Schafer was working on November 12 and November 13 were persuasively described by the Secretary's witness, Edwin Whetham, a dozer operator who was employed at the mine during the pertinent period and who actually observed (T. 199) the defective condition of the G-3's brakes:

"Q. What would you believe could happen if he wasn't able to stop, what kind of things?
A. Well I think he could have gotten run into with a scraper or if he would have tried to dodge off, he could have went over the edge of the embankment, and if he had tried, rather than stop and back up, tried to pull off the side, he could have went over the edge and down the incline or into a mudhole or whatever.
Q. And what kind of injury could result in going over the incline or --
A. Well he could have got rolled over and he could have go injured pretty good in a roll over sliding down the incline That's pretty dangerous I would say.
Q. Is it possible he could have been killed?
A. Oh, yeah, it's possible, yeah." (T. 201)

This description of the potential dangers posed by Schafer's continued use of the G-3 with its defective brakes are generally supported in the record and consistent with the conditions and terrain in the area where Schafer was assigned to work during the period in question.

On November 14, when Schafer arrived for work, the G-3 was being torn apart for repairs and he operated the G-4 blade on that date (T. 97, 184, 437-439). At the beginning of this shift Rich Schneider and Dean Bray told Schafer that they felt he had not followed procedure shutting the blade down and tagging it out and that he would probably be reprimanded (T. 98, 415). Schafer became aware at this time that on the preceding shift (day shift on November 14, members of the safety committee had checked out the G-3 (T. 98, 434). This, of course, was after his second tag-out (T. 526).

On the evening of November 14, Schafer asked Foremen Bray and Schneider, after they had advised him he was to receive a reprimand, to drive him to the shop so that he could call MSHA. After first refusing, Bray and Schneider relented and drove him to the repair shop, telling him he would have to do it on his own time. Schafer made several calls, and while he was doing so, Mr Suess arrived and told him it would be on his own time and that he would have to pay for every phone call. When Schafer was unable to reach the MSHA inspector at his home (T. 178) Suess told him he would have to go home to make further phone calls, and to either go back to work or go home. Schafer returned to work. Subsequently, an hour's time was deducted from his

paycheck for this period, amounting to $16.61 (T. 287), which is the only pay Schafer lost from the entire episode (T. 100-103, 177).

On November 15, 1984, Mike Quinn, Respondent's safety director, told Schafer he was to get a letter of reprimand, and shortly thereafter Quinn came back with Marvin Suess and Suess handed Schafer the reprimand (Ex. 11; T. 99-100). Although the parties stipulated (T. 287) that the undated reprimand was issued on November 16, the evidence shows it was delivered to him on November 15.

On the morning of November 15, 1984, Schafer posted a copy of Article III (i) of the union Contract on the union bulletin board (T. 479-481, 534, 537) (one of three) near the bath house (T. 422) with the following notation which he had written at the bottom thereof (Ex. 12; T. 540):

> "This shows Marv's policy on taking equipment out of service contradicts this section of the contract. His policy is a joke and a scare tactic for those gullible enough to be taken in by it.
>
> Signed: a miner concerned for safety"

Schafer prepared and posted this document (T. 432-433; Ex. 12) after he learned he was to be reprimanded (T. 530, 540), after Mr. Suess had commenced the process of reprimanding him (T. 422, 443, 488, 494, 530, 540), and for the following reason:

> "I wanted to make everybody aware that it's not the way it had been done and it was in violation of past practice and custom and according to the contract; and not to be intimidated by it, because that's all I felt it was, was a way of intimidating everybody and taking away their right to remove themselves from a dangerous situation or shut anything down." (T. 537).

On November 15, 1984, Schafer received the following letter of reprimand (Ex. 11) from Marvin R. Suess, Glenharold Mine Superintendent:

> Mr. DuWayne Schafer
> Box 1253
> Wilton, ND 58579
>
> RE: Tag-out Procedures
>
> DuWayne:
>
> Safety rights of employees and the right to safe working conditions are the highest priority items at Glenharold

Mine, but they must not be abused by either the employees or the employer. Consol and BCS have great respect for tag-out procedures and have always wanted all equipment to be operable and safe, but there comes a time when the operation of equipment could be better, yet not unsafe to operate. If there exists an unsafe condition it should be tagged-out following the company procedures. At that point the employee is saying that the equipment is abnormally hazardous and could cause immediate danger to the operator. No employee shall be discriminated against for utilizing this procedure.

A memo posted on the bulletin board indicated "Marv's policy is a joke"; I'm not real sure what you were referring to since an unsafe piece of equipment has always gotten repaired when it was unsafe to operate or where it was apparent it was dangerous to operate. We have had several cases where an employee tagged-out equipment that was not unsafe to operate and this must stop. Should this continue then all respect for tagged equipment will be lost.

After a complete investigation of G-3 Motor Grader, which you tagged-out twice on November 12th and 13th, your local union Safety Committee, Mike Quinn, several additional mechanics, several foremen, and I concluded that G-3 was not unsafe to operate. It was explained to you that G-3, our spare motor grader, was to be used until G-4 was repaired at which time the reclamation blade operators would again operate G-4 full-time. The areas in which G-3 were to be used were safe areas to operate such a blade.

From our investigation, we have concluded that you have abused our procedure of tagging equipment, and you have failed to follow the guidelines of the BCS-UMWA Agreement of 1984. You did not act in good faith in exercising your rights and are therefore issued this written reprimand for the aforementioned items.

In order to provide a safe work place I ask that you refrain from misuse of company tag-out procedures, refrain from

posting memos that are false, and abide by the rights provided in the Surface Coal Wage Agreement of 1984 to resolve any problems you may believe exist.

Regretfully submitted,

s/ Marvin R. Suess,
Glenharold Mine Superintendent" 7/

Marvin Suess, in his position as mine superintendent, initiated, drafted, signed and issued the reprimand to Schafer, and was the official in Respondent's management hierarchy primarily and effectively responsible for determining that Schafer should be reprimanded (T. 418, 441-446, 499, 508-511). The decision to reprimand Schafer was made on November 14, 1984, in the late afternoon (T. 442, 443, 530). Mr. Suess could not say whether it was on November 14 or November 15 that he became

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7/ (a) It should be noted that the phrases "abnormally hazardous" and immediate danger" used by Mr. Suess in the first paragraph of this undated reprimand letter (T. 521-523), while possibly recognizable as established mine safety concepts and jargon, appear to invoke the language of Article III, Section (i)(1) of the contract Grievance Procedure (Ex. 19) set forth above. In its landmark Pasula case, infra, the Federal Mine Safety and Health Review Commission noted with respect to what I believe and conclude are analogous and applicable "refusal to work" principles that such contractual language permits refusals to work in only what might be called an "abnormal imminent danger" and declined to construe that Act to limit a miner's refusal to work to only such conditions.
(b) Close analysis of the reprimand letter reveals (a) that its primary thrust is Schafer's alleged "abuse" of the tag-out procedure, and (b) that it fails to precisely describe how Schafer did so (T. 103). Nor does it explain to Schafer how he "failed to follow" the 1984 contract. It can be inferred that the "abuse" Mr. Suess had in mind was generally that Schafer tagged out a piece of equipment that was not unsafe. Significantly, the timing of events, Schafer's knowledge of them, and their interplay with the specific rights of miners under the tag-out procedure and grievance procedure and the requirements thereof applicable to both miners and management was not delineated. Also, Mr. Suess did not discuss the matter with Schafer before issuing this reprimand (T. 497). There is no evidence that Schafer was ever told why Respondent concluded the G-3 was safe to operate, or which "areas" Respondent thought it was safe to operate in. Schafer was told, though, that management wanted to operate the G-3 until the G-4 was out of the repair shop.
(c) At the hearing, Mr. Suess could not say, assuming arguendo that the only thing Schafer did wrong was abusing the tag-out procedure, whether or not Schafer would have been reprimanded (T. 508-510, 478).

aware of Schafer's "Marv's policy" is a "a joke" notation at the bottom of the copy of ART III of the Union Contract posted on the bulletin board (T. 445; Ex. 12).

Mr. Suess at first conceded that Schafer's first tag-out was proper (T. 425), but only because the steering mechanism was defective (T. 425). Mr. Suess took the position, however, that with respect to the G-3's brakes, the first tag-out by Schafer was not in "good faith" (T. 449-450). Yet, when the brakes were ultimately removed for repairs Mr. Suess who was present in the repair shop did not examine them closely and professed not to have been curious about their condition (T. 490-491). I find this consistent with the discriminatory frame of mind I attribute to Respondent in this matter. The net effect of Respondent's various failures to follow its past practices and tag-out policies in this esposode was, along with its premature initiation of disciplinary action, a provocation to Schafer and a discouragement of his taking a required, protected safety measure.

Mr. Suess took the further position that the second tag-out was improper on the following basis stated at the hearing:

> "Q. Okay. When Mr. Schafer came back on shift on the evening of the 13th, following removal of the first tag, he disputed removal of that tag with his foreman and placed a second tag on it. Was that, in your opinion, proper?
>
> X X X X X X X X
>
> A. I believe he should have then gone through his grievance procedure since management had already made the determination that it was safe to operate. I do not deprive the man of removing himself from that piece of equipment, but by tagging it out, it also did not allow us to utilize anybody else on the piece of equipment" (T. 425-426).
> (emphasis supplied)

An important follow-up in Mr. Suess's position occurred subsequently in his testimony:

Q. Okay. When do you think he was not -- acting in bad faith --- what did he do that you think was in bad faith?

> A. In the fact that he ran it from four o'clock until the steering broke before the brakes became an issue. Yet the brakes didn't change at all. And then tagging it the second day, knowing what has been done -- what had been inspected. And then also riding that motor grade in that

fourth gear with the mold board up and the ripper up, to me if the brakes were that bad, it should have never been rode, it should have been towed to the shop. (T. 450). 8/

ULTIMATE FINDINGS, CONCLUSIONS AND DISCUSSION

In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir., 1981)); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); and Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National

8/ Mr. Suess's misunderstanding and rationalizing of the sequence in which certain crucial events occurred must be underscored at this juncture: the record is overwhelming that when Schafer put on the second tag he had not been advised that management (Mr. Brown) had determined that the brakes were safe or otherwise informed of management's position. Mr. Suess subsequently conceded that Schafer did not know that management had evaluated the equipment before he put on the second tag (T. 463-464, 476-477, 507). Further, Mr. Suess was not sure, even at the time of the hearing, whether any Safety Committeeman had been advised of management's determination (T. 464, 477, 507). These facts, among other things, place Respondent in contravention of Section 3(b)(4)(a) of its own Tag-Out Procedure. Even so, Mr. Suess reprimanded Schafer and steadfastly held to the position that Schafer had abused the tag-out procedure, even on the first tag-out with respect to the brakes (T. 449-450). While assuming this posture it is significant that Mr. Suess did not undertake to ascertain the brakes' condition after they were removed in the repair shop (T. 491).

Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

The essence of Respondent's defense appears to be that Schafer, on both tagouts, was not in good faith and was unreasonable in his position that the G-3's brakes were unsafe, and that the tagouts were thus not "protected activities." Respondent's basis for asserting that Schafer was not in good faith or reasonable relies heavily on the fact that its personnel made checks of the G-3 and determined it to be safe for use under restricted conditions and at certain locations. However, the facts that these tests were made and the decisions made by Respondent's management were either (1) not communicated to Schafer or (2) were made after Schafer had attached the second tag on the machine. It is clear also that the joint test that management made with the safety committee was performed after the second tagout (T. 514). Respondent failed to establish that Schafer was told that management felt the G-3 was safe to use in certain areas or that he should not use the G-3 in inclined areas. Yet Mr. Suess also indicated that "99 times out of 100", management concurred with a miner's assertion that equipment was unsafe (T. 518). Thus, in this episode, Respondent broke a very strong pattern and did not communicate its position or findings to Schafer before his second tagout.

Tagging out equipment believed to be unsafe is a safety activity protected by the Act and required (T. 519). Schafer's belief that the brakes on the G-3 were defective and rendered operation of the G-3 unsafe on both November 12 and November 13, 1985, was reasonable (T. 503-504) in good faith, [9]/ and calculated to protect himself and other operators using the G-3 from safety hazards. This was borne out by various of his actions at the time including demonstrating the defective brakes to a fellow employee and listing such on both tags. That the brakes were actually unsafe is shown by the condition they were found in after their removal, the considerable "pause" in their operation, and the distances the G-3 traveled after the brakes were applied. There is no prohibition, express or implied, in Respondent's tag-out procedure, against tagging out equipment believed to be defective more than once. The essence of a proper tag-out is a miner's reasonableness and good faith in believing equipment is unsafe. Indeed, Schafer was obliged to tag-out the G-3 since a miner's failure to tag out unsafe equipment subjects his employer to sanctions under the Act for violations of the safety standards (T. 458). Respondent's contentions that Schafer "abused" the

9/ See Secretary ex rel. Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1524 (1983).

tag-out procedure and thus was not engaged in a protected activity is not established in the record. 10/ What is clear, as previously noted, is that Respondent being fully aware of Schafer's safety concerns did not follow its own tagout procedures.

Respondent, admittedly desirous of keeping the G-3 in operation for productivity reasons, took disciplinary (adverse) action against Schafer for his engagement in the protected activity described above. Its belated contention that Schafer should have removed the tag himself after he was advised that management considered the brakes safe (T. 477-478) is pretextual. Management personnel removed the tag the night before and no reason having any merit was submitted why it could not have removed the second tag had it chosen to do so. 11/ The mine superintendent, who investigated the matter before reprimanding Schafer, did not bother to ascertain Schafer's position (T. 497-498), the basis for his belief that the brakes were unsafe, or his state of knowledge, before reprimanding him. The mine superintendent, Mr. Suess, did concede that Schafer "probably" would not have been reprimanded for the allegedly improper unprotected activity of putting the "Marvin's policy is a joke" note on the bulletin board (T. 509-510). The record shows, and I have found, that the reprimand process was initiated before Schafer posted the note. Respondent clearly failed to establish that it would have taken the adverse action in any event for Schafer's alleged unprotected activities alone. Rather, in reprimanding Schafer, Respondent appears to have been motivated by Schafer's protected activity in tagging out the G-3 and its

10/ Mr. Suess's ipse dixit that Schafer "abused" the tag-out procedure aside, Respondent failed to persuasively show Schafer was proceeding in bad faith in the tag-outs. I infer from the fact that Respondent did limit the G-3's use to certain areas that it considered the G-3's brakes unsafe for use in other areas. Compounding the essential unreasonableness of its position, there is no evidence that Respondent ever told Schafer he was not to use the G-3 in certain areas before the second tag-out.

11/ By taking this position, and by failing to recognize that a "dispute" as to safety of the G-3 existed, it was Respondent's management which blocked the operation of Art. III, Section (i) of the Union Contract. Thus, the matter was not "reviewed" by management and "at least one member" of the Safety Committee within 4-hours, as required by the contract. Respondent, instead, let Schafer know with considerable alacrity that he was to be disciplined. From this, its strong desire to keep the G-3 in production, its failure to follow its own procedures, the fundamental unfairness in its position vis a vis Schafer, and the transparency of some of its arguments as previously noted, I infer that its motivation was discriminatory. Houser v. Northwestern Resources , 8 FMSHRC 883 at 886.

patent displeasure in his taking the G-3 out of operation befor the G-4 was out of the repair shop. Accordingly, it is conclud that Respondent failed to establish any rebuttal or affirmative defense afforded under the Act or by precedent. Specifically, failed to establish by reliable, probative, or convincing evi- dence that Schafer's tag-out actions were not protected, that t reprimand was in no part motivated by Schafer's two tag-outs, o that it would have reprimanded Schafer for unprotected activiti alone. A violation of Section 105(c) of the Act is found to ha occurred.

LOSS OF PAY

The Secretary claims that Schafer is entitled to reimburse ment of $16.61, representing one hours pay. Schafer was docked for this time-which apparently was used to call fellow employee to get the phone number of an MSHA Inspector on the evening of November 14, 1984 - after he was advised he was to receive a re primand.

The Secretary failed to establish Schafer's entitlement to reimbursement. Very little evidence was adduced on this questi No urgency or necessity for his attempting to call the inspecto at this time was shown, nor was it shown why Schafer could not have made the calls on his own time at the conclusion of the shift on the following day. Schafer was advised in advance tha he would be charged for the time he was utilizing, but was allowed by his management to take the time to do so.

It is concluded from the thin record on this point, that Schafer's loss of this pay was not an expected or normal result from the discriminatory action of Respondent and an award therefor is denied.

PENALTY ASSESSMENT

As noted above, the violation of section 105(c) of the Act occurred when Respondent Consolidation was the operator of the Glenharold mine. The parties stipulated that there were no previous violations of Section 105(c) during the pertinent 2-ye period preceding the subject violation (T. 291). I have previously determined that Consolidation is a large mine operat and the parties further stipulated that assessment of a penalty would not adversely affect its ability to continue in business (T. 287). In this matter the concept of prompt abatement of th violation has no specific relevance in view of the Respondent's good faith assertion of the legality of its position, and the complexity of the legal issues involved. Prompt abatement here would amount to the surrender of its right to assert its own position and to a hearing on the merits.

The remaining statutory assessment factors, negligence and gravity, also require some conceptual transposition from the ordinary meanings thereof in matters involving violations of discrete safety and health standards to a discrimination

violation. With respect to the seriousness of the violation, the adverse action taken here against the complaining miner, as in many discrimination cases, could have the effect of discouraging the taking of protected safety activity by other miners in the future. While there is no basis to question the sincerity of Respondent's concern for the viability of its tag-out procedures generally, with respect to the two tag-outs by Schafer here I have concluded that Respondent's response to such was discriminatory. I find no credible basis in the record to conclude that Schafer or other miners were in the past the subject of oppressive measures to discourage safety activities. As evidenced by Schafer's actions themselves, and by the absence of other probative evidence, the instant adverse action was not taken in such a background of intimidation as to dishearten justified, reasonable, and required safety activity of miners in the future. Accordingly only a moderate degree of gravity is attributed to this violation.

The concept of negligence has no direct applicability to this particular matter. The adverse action was taken wilfully and thus the broader idea of the culpability of Respondent's managment in reprimanding Schafer is to be considered. In this connection it is first noted that because there was no showing that an "explanation" was ever given to either Schafer or a safety committeeman concerning the removal of the first tag, and it does not otherwise appear that such was the case, Respondent did not establish that it was in compliance with its own tag-out procedures. While charging Schafer with "abuse" of the tag-out procedure in various respects it appears that if there was any deviation therefrom, it was on the part of Respondent's management. Schafer, who took safety - calculated action in putting the second tag on the G-3, had done so without it having been explained to him what had taken place by the repair shop with respect to the first tag the night before. Nevertheless, the mine superintendent, with apparent knowledge of this (T. 463-464), proceeded to reprimand him.

Since a member of management, in this case Brown, the repair shop foreman, had taken off the first tag, either he or any other foreman could have taken off the second tag had it wished to do so on the second night, before or after informing Schafer of their testing and determination that the brakes were safe. It was Respondent's management, by not following its own procedures (T. 463-464), who thwarted the dispute from going to resolution through the grievance procedure by (1) taking the position that Schafer, not it, should have removed the second tag (T. 477 after being notified of management's determination, and (2) letting it be known to Schafer in advance and nearly immediately that he was to be disciplined. During Schafer's shift on November 13 and after the second tag was placed on the G-3, nothing prevented Respondent from following its own procedures by:

(2) advising Schafer that it had checked the brakes a considered them safe, and,
(3) if Schafer persisted in his position that the bra were unsafe,
(i) advising him that there was a safety dispute, which under both the union contract and the Tagou Procedure, must be resolved through the Contract Grievance Procedure (ART. III (i),
and (ii) assigning him to other work.

In reviewing the foregoing and the entire record it is f that Respondent's motivation in the discipline of Schafer was willful and retaliatory. Respondent gave him no audience bef taking the action. It allowed no disagreement whatsoever wit its determination that the brakes were safe, even though any determination or belief was never communicated to Schafer as the first tag-out and-as to the second tag-out-was firmed up further testing after the second tag was placed on the G-3.

After weighing the above assessment considerations, it i concluded that a penalty of $1,000.00 is appropriate.

ORDER

1. The written reprimand of Complainant DeWayne Schafer dated November 16, 1984, shall be removed by both Respondents from his employment records and all references thereto in oth of Respondents' records shall be expunged.

2. Respondent Consolidation shall pay the costs and expenses reasonably incurred by Complainant in connection wit the institution and prosecution of this proceeding.

3. Counsel are directed to immediately confer and attem to agree on the amount due under paragraph 2 and, if they can agree, to submit a statement thereof to me within 20 days of date of this decision. If they cannot agree, Complainant sha within 30 days of the date of this decision, file a detailed statement of the amount claimed, and Respondent shall submit reply thereto within 20 days thereafter. This decision shall be final until I have issued a supplemental decision on the amount due under paragraph 2.

4. Respondent Basic, the current owner and operator of Glenharold Mine, shall post a copy of this decision on the appropriate bulletin board at the subject mine which is avail to all employees for a period of 60 days.

5. Respondent Consolidation shall pay the Secretary a penalty of $1,000.00 within 30 days of the date of this decis

Michael A. Lasher, Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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OCT 17 1986

LONNIE SMITH, Complainant	:	DISCRIMINATION PROCEEDINGS
v.	:	Docket No. VA 86-7-D
RECO, INC., Respondent	:	
DILLARD SMITH, Complainant	:	Docket No. VA 86-9-D
v.	:	
RECO, INC., Respondent	:	

DECISION

Appearances: Hugh F. O'Donnell, Esq., Client Centered Legal Services of Southwest Virginia, Inc., Castlewood, Virginia, for Complainant Lonnie Smith; William E Talty, Esq., Talty & Gillette, Tazewell, Virginia for Complainant Dillard Smith; Robert B. Altizer, Esq., Gillespie, Hart, Altizer & Whitesell, Tazewell, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainants Lonnie Smith and Dillard Smith, brothers, wer employed by Respondent Reco, Inc. (Reco) from about 1977 until November 26, 1985. Each claims that on the latter date he was discharged because of activity protected under the Federal Mine Safety and Health Act (the Act). Because the two complaints arose out of the same incident or incidents, the two cases have been consolidated for the purposes of hearing and decision. Pursuant to notice, the cases were called for hearing on July 8 1986 in Bluefield, West Virginia. Dillard Smith and Lonnie Smi testified for Complainants; Steve Williams and Don Bowman testified on behalf of Respondent. All parties were afforded t opportunity to file post hearing briefs. Respondent filed a brief; Complainants did not. I have considered the entire recor and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. On November 26, 1985, Respondent was in the business of selling and servicing mine batteries. Part of its business required it to go into underground coal mines to service batteries.

2. Complainants Dillard and Lonnie Smith were employed by Respondent beginning in 1977 or 1978. Their duties were to service and maintain mine batteries. Dillard Smith had prior experience working with mine batteries, but Lonnie Smith did not have such prior experience. Neither of them worked in underground coal mines prior to working for Respondent.

3. Both Dillard and Lonnie Smith were required at times to work repairing batteries in underground coal mines. During 1985, Dillard worked approximately 49 hours, and Lonnie worked approximately 50 hours in underground mines. Each performed more than 40 hours of underground work in the 6 months prior to the termination of their employment.

4. Dillard was paid $6.75 per hour as of November 26, 1985. Lonnie was paid $6.35 per hour. Each received an additional $2.00 per hour while working underground in coal mines. They each worked approximately 40 hours per week.

5. In November 1979, Dillard Smith received MSHA approved training for underground work and received a certificate upon completion of the course. He did not have any refresher training or any other training related to working underground after November 1979.

6. Lonnie Smith never received any training related to working in underground mines.

7. In June 1985, Dillard Smith asked Steve Williams his foreman, about refresher training for himself, and about training for Lonnie. Williams nodded but did not reply. Dillard had inquired at an MSHA office and was told that his training certificate had expired, and he needed 40 hours additional training.

8. On some occasions Dillard and Lonnie Smith were accompanied by mine personnel when they serviced batteries in underground mines. On other occasions they worked alone.

9. On November 26, 1985, Dillard and Lonnie Smith were working on batteries at Respondent's shop. At about 9:00 a.m., Steve Williams approached and told Dillard that he had a service call. Dillard asked if it was in an underground mine and

Williams said it was. Dillard told Williams that he was not going. Williams then said: "Change your clothes and you know where the door's at." (Tr. 31). Dillard changed from his work uniform, turned in his car keys and credit card and left the premises. Neither he nor Williams said anything further.

10. After Dillard left, Williams turned to Lonnie Smith. Lonnie said he was not going underground anymore. Williams told him to get his clothes and hit the door. Lonnie then left.

11. Dillard Smith applied for unemployment compensation after he left Reco. He drew benefits for 26 weeks. His health insurance policy was terminated on the day he left. He returned to the mine site on November 26, 1985 to get his paycheck. He was told by the office secretary that it had been mailed the previous day. He did not contact or attempt to contact any other Reco official concerning his termination. He told the office secretary to inform Jack Pyott, the company president, that he left because he did not want to go underground because his training had expired. Dillard began working for a janitorial service company about July 1, 1986. He is earning $3.35 per hour and works 30 hours per week.

12. Lonnie Smith was unemployed for 5 months after leaving Reco. He has worked since, setting up house trailers and earns $4.50 per hour. His health insurance was cancelled when he left Reco and in December, 1985 he and his family incurred medical bills totalling approximately $600.

13. Lonnie Smith never complained to Reco about his lack of training. He did not tell anyone at Reco why he refused to go underground.

14. On November 26, 1985, Reco decided to terminate its mine battery sales and service business. The decision followed a discussion with the State of Virginia Labor Department officials concerning a list of health and safety violations cited following an August, 1985 inspection. The State officials agreed not to issue citations if Reco terminated its mine battery business within a week. The company agreed and the business was terminated December 6, 1985.

15. Respondent continued in business after December 6, 1985 solely to sell its spare parts inventory and make deliveries on repairs completed prior to December 6. Foreman Steve Williams was laid off December 18, 1985, as was the office secretary. One other employee remained until March, 1986 helping to clean the building, trying to get it ready for sale or lease. At the time of the hearing, the only people on Reco's payroll were

Don Bowman, Vice-President-General Manager and a person who cleans the office, working about 2 hours a week.

ISSUES

1. Whether Complainants were miners and Respondent an operator under the Federal Mine Safety and Health Act?

2. Whether Complainants were discharged because of activity protected under the Act?

3. If so, to what relief are Complainants entitled?

CONCLUSIONS OF LAW

A. Jurisdiction

1. Respondent was an "operator" to the extent that it performed services at coal mines and, as such, was subject to the provisions of the Mine Safety and Health Act.

Section 3(d) of the Act defines operator as "any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

2. Complainants were "miners" to the extent that they worked in coal mines. (Section 3(g) of the Act.) Whenever Complainants went to coal mines to service batteries, they were miners, and were protected by the Act.

3. Insofar as Respondent was an operator and Complainants were miners, I have jurisdiction over them and the subject matter of this proceeding.

Respondent's entire business involved the sales and servicing of mine batteries for coal mines. Although most of its work was performed at its own facilities, the work it did at the mine sites was not "rare and remote" as was that of the electric power company in Old Dominion Power Company v. Donovan, 772 F.2d 92 (4th Cir. 1985). When Respondent's employees went into underground coal mines, they were subject to the same hazards as miners who produced coal. They are entitled to the same protection under the Mine Act.

B. Protected Activity

1. Complainants' refusal to perform underground work because they had not received mandatory health and safety training was activity protected under the Act.

A miner has the right under section 105(c) of the Act to refuse to work, if he has a good faith, reasonable belie that it is hazardous. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 633 F.2d 1211 (3r Cir. 1981); Secretary/Robinette v. United Castle Coal Co., FMSHRC 803 (1981); Simpson v. Kenta Energy, Inc., 8 FMSHRC (1986).

Section 115 of the Act requires each operator to have a health and safety training program which must provide as minimum that miners with no underground experience receive no less than 40 hours of training if they are to work under ground, and all miners shall receive no less than 8 hours o refresher training every 12 months. Complainants' refusal to work underground without the required training was there fore reasonable, and there is no evidence that it was other than in good faith.

I do not determine in this proceeding whether Respondent is responsible for providing the requisite training for its employees. Respondent contends that if a violation occurred, it is that of the mine operator, not Respondent. But in either case, training was not provided, and Complainants were justified in their refusal to work underground without it. See Secretary/Robinette, supra.

C. Adverse Action

1. Complainants were discharged because of their refusal to work underground.

Respondent contends that Complainants were not discharged, but voluntarily quit. I accept the testimony of Complainants as to what they were told by their foreman Steve Williams and conclude that they were discharged.

D. Communication of Safety Concerns

1. Complainants did not communicate their safety concerns to the operator.

Where reasonably possible, a miner refusing work must ordinarily communicate or attempt to communicate to some representative of the operator his belief that a safety or health hazard exists. Secretary/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982); Simpson v. Kenta Energy, Inc., supra.

It was clearly reasonably possible for Complainants to tell Williams that they refused to work underground because they lacked training. They did not do so. Dillard Smith's request for training some months previously cannot be converted into a notification of safety concerns at the time of the work refusal. The fact that Respondent was aware of blatant safety violations does not, according to the Commission, excuse the failure to communicate. Simpson v. Kenta Energy, Inc., supra.

Dillard Smith did communicate his safety concerns to the office secretary the day after his discharge and asked her to tell the company president, Jack Pyott. Mr. Pyott was present during the hearing, but did not testify. I assume that the message was given him. Is this adequate communication? Respondent has already decided to cease operations, so it would not have been possible for it to "address the perceived danger." Simpson, supra. I conclude that under the circumstances of this case, the communication of safety concerns to the operator on the day after the miners' discharge did not satisfy the Dunmire and Estle and Simpson test.

2. Therefore, Complainants were not discharged for activity protected under the Act and no violation of section 105(c) has been established.

ORDER

Based on the above findings of fact and conclusions of law, the complaints of Dillard Smith and Lonnie Smith, and these proceedings are DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 20 1986

CRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 86-91-M
Petitioner	:	A.C. No. 23-00188-05518
	:	
v.	:	Selma Plant Quarry & Mill
	:	
VER CEMENT COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

fore: Judge Morris

Respondent has moved to dismiss the above case for the ason that the Secretary's PETITION FOR ASSESSMENT OF CIVIL NALTY was not timely filed.

In his memoranda filed in the case the Secretary does not ncede the facts but he states that his petition "may" have been led beyond the 45 day period as required by Commission Rule (a), 29 C.F.R. § 2700.27(a). The Secretary also asserts that e respondent has failed to show any prejudice. The Secretary s not filed any affidavits nor has he denied certain relevant cts that appear as a matter of record.

These facts are that the appeal process was initiated on ril 24, 1986 with a notice of contest (notice of contest form). e Secretary filed his petition on June 16, 1986 (time/date amp on petition in file).

In support of his position the Secretary states as follows:

> Although his petition may have been beyond the 45 day limitation recited at 29 C.F.R. 2700.27, the Secretary asserts that this resulted from miscalculation of time periods in the normal processing of this type of case in the office of the Secretary's counsel. This miscalculation occurred due in part to inadvertence by the Secretary's representative and in part due to the fact that the respondent sent at least three separate responses to the notice of proposed penalties. Based on the date stamp of May 5, 1986, on the last of the three letters from respondent, the Secretary's calculated a due date of June 19, 1986. The Petition was actually filed on June 11, 1986, a mere two days beyond the due date alleged by respondent in his motion.

While it appears that the Secretary's petition may have been filed two days beyond the 45 day period, it is also apparent that respondent has demonstrated no prejudice to himself as a result.

Discussion

The applicable case law is contained in Salt Lake County Road Department (1981) and Medicine Bow Coal Company, 4 FMSHRC 882 (1982).

In these cases the Commission ruled that a two tier test exists in a late filing situation. The initial test requires the Secretary to show adequate cause to support his late filing. In Salt Lake and Medicine Bow the Secretary's excuse of insufficient clerical help was accepted as minimally adequate. The second test is that dismissal could be required, notwithstanding adequate cause, when an operator demonstrates prejudice caused by the delayed filing.

In view of the Commission's pronouncements it is necessary to examine the record to determine whether the Secretary has established adequate cause.

As a threshold matter it appears that the appeal process commenced with a notice of contest dated April 24, 1986.

Under Commission Rule 27(a), 29 C.F.R. § 2700.27(a), the Secretary was obliged to file his petition within 45 days. The 45 day period expired on June 9, 1986. The Secretary filed his petition on June 16, 1986 which was 53 days after receiving the notice of contest and 7 days late.

In justification of the late filing the Secretary basically states it was due to "inadvertence by the Secretary's representative" and due to the fact that "respondent sent three separate responses to the notice of the contest".

Inadvertence does not constitute justification for the late filing of a complaint.

The letters relied on by the Secretary all post-date the notice of contest of April 24. The 45 day period began to run after receipt of the April 24 notice.

In Medicine Bow an issue was presented as to whether the filing time for penalty proposals should be augmented by the 5

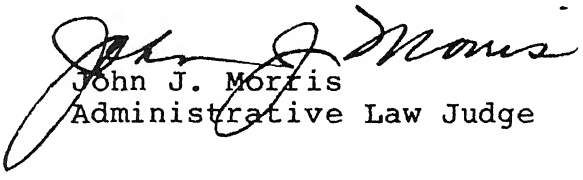
days that Commission Rule 8(b), 29 C.F.R. § 2700.8(b) allows filing documents in response to those served by mail. The Commission ruled "[t]he 45-day period in Rule 27 is a sufficient amount of time to allow for the processing of mail" ... furth ... Rule 8(b) does not apply to the Secretary's filing of pen proposals" 4 FMSHRC at 884.

For the foregoing reasons I conclude that the Secretary failed to show adequate cause to justify the late filing of h petition.

Accordingly, I enter the following:

ORDER

CENT 86-91-M is dismissed.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 20 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 86-127-M
Petitioner	:	A.C. No. 23-00188-05520
	:	
v.	:	Docket No. CENT 86-128-M
	:	A.C. No. 23-00188-05521
RIVER CEMENT COMPANY,	:	
Respondent	:	Selma Plant Quarry & Mill

ORDER OF DISMISSAL

Before: Judge Morris

Respondent has moved to dismiss the above cases for the reason that the Secretary's PETITION FOR ASSESSMENT OF CIVIL PENALTY was not timely filed.

In his memoranda filed in the case the Secretary does not concede the facts but he states that his petition "may" have been filed beyond the 45 day period as required by Commission Rule 27(a), 29 C.F.R. § 2700.27(a). The Secretary also asserts that the respondent has failed to show any prejudice. The Secretary has not filed any affidavits nor has he denied certain relevant facts that appear as a matter of record.

These facts are that on June 27, 1986 respondent filed its notice of contest in each of these cases. (Notice of contest form in each file). The Secretary filed his petitions with the Commission on September 3, 1986. (Time/date stamp on petition in file).

In support of his position the Secretary states as follows:

Although his petition may have been beyond the 45 day limitation recited at 29 C.F.R. § 2700.27, the Secretary asserts that this resulted from miscalculation of time periods in the normal processing of these cases in the office of the Secretary's counsel. This miscalculation resulted from two factors. First, a delay in processing was encountered at the Civil Penalties Processing Unit (CPPU) of the Mine Safety and Health Administration in Arlington, Virginia due to a change in policy being implemented in that office at the time the respondent's Notice of Contest and Request for Hearing in these matters was received. Due

to this unusual delay in processing at the CPPU and the resultant delayed arrival of the case file to the office of the Secretary's counsel, the date stamp of July 11, 1986 on the Request for Hearing Form was inadvertently picked up as being the date the Request for Hearing was received in the CPPU (it being in line with the time factor usually involved in this type of case from the time of receipt of the Request for Hearing at the CPPU until the receipt of the file in the office of the Secretary's counsel). Based upon the date stamp of July 11, 1986 the Secretary calculated a due date of August 29, 1986, which is eighteen days beyond the due date alleged by respondent in its motion.

While it appears that the Secretary's petition may have been filed eighteen days beyond the 45 day period, it is also apparent that respondent has demonstrated no prejudice to itself as a result.

Discussion

The applicable case law is contained in Salt Lake County Road Department, 3 FMSHRC 1714 (1981), and Medicine Bow Coal Company, 4 FMSHRC 882 (1982). In these cases the Commission ruled that a two-tier test exists in a late filing situtation. The initial test requires that the Secretary to show adequate cause to support his late filing. In Salt Lake and Medicine Bow the Secretary's excuse of insufficient clerical help was accepted as minimally adequate. The second test is that dismissal could be required, notwithstanding adequate cause, when an operator demonstrates prejudice caused by the delayed filing.

In view of the Commission's pronouncements it is necessary to examine the record to determine whether the Secretary has established adequate cause.

As a threshold matter it appears that the appeal process commenced with a notice of contest on June 27, 1986. Under Commission Rule 27(a) 29 C.F.R. § 2700.27(a) the Secretary was obliged to file his petition within 45 days. The 45 day period expired on August 11, 1986. The petitions were in fact filed on September 3, 1986 which was 68 days after receipt of the notice of contest and 23 days late.

In justification of the late filing the Secretary basically states it was due to a "change in policy" at his office at the Civil Penalties Processing Unit and by a subsequent misreading of a date stamp.

The "change in policy" was not further explained and may have some meaning for the Secretary but it fails to present the judge with any facts to justify the late filing. In addition, I do not see how a "change in policy" could affect a long standing filing requirement.

In addition, the Secretary also states that a date stamp of July 11, 1986 was inadvertently relied on to calculate a date of August 28, 1986.

In Medicine Bow the Commission specifically rejected the Secretary's reliance on such internal date stamps describing it as "internal bureaucratic processing" 4 FMSHRC at 884, footnote 5.

For the foregoing reasons, I conclude the Secretary has failed to show adequate cause to justify the late filing of his petitions.

Accordingly, I enter the following:

ORDER

1. CENT 86-127-M is dismissed.

2. CENT 86-128-M is dismissed.

John J. Morris
Administrative Law Judge

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WASHINGTON, D.C. 20006

October 21, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEATLH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-193 A.C. No. 36-00917-03625
v.	:	
HELVETIA COAL COMPANY, Respondent	:	Lucerne No. 6

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve settlements of the two violations involved in this case. The originally assessed penalty for each violation was $750, for a total of $1,500. The proposed settlement for each violation is for $425, for a total of $850.

Citation No. 2695543 was issued for violation of 30 C.F.R. § 75.301 because an excessive amount of methane was detected in the mine. Citation No. 2696487 was issued, also for violation of 30 C.F.R. § 75.301, because an inadequate amount of oxygen was detected in the mine.

The Solicitor's motion discusses both violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The Solicitor represents that a reduction in the proposed penalties is justified because both gravity and negligence were less than originally thought. The violations were detected during a preshift examination following a weekend shutdown of the mine. The problems had developed during the 48-hour shut-down period when no miners were in the mine and the operator was not required to make preshift examinations. The Solicitor also represents that the methane accumulation took place in an area where none had been before.

The representations and recommendations of the Solicitor are accepted.

Accordingly, the motion to approve settlements is GRANTED and the operator is ORDERED TO PAY $850 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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October 21, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRAION, ON BEHALF OF JOHN W. BUSHNELL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 85-273-D
	:	HOPE CD 85-1
	:	Pocahontas # 3 and #4 Mines
v.	:	
CANNELTON INDUSTRIES, INC., Respondent	:	

DECISION

Appearances: Jonathan M. Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for Complainant;
Larry W. Blalock, Esq., and Michael J. Bommarito, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, WV, for Respondent.

Before: Judge Fauver

This action was brought by the Secretary of Labor under § 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et. seq., to recover lost pay alleged to be due John W. Bushnell for reduction of his pay rate after a transfer while he was a Part 90 employee. The Secretary also seeks a civil penalty for the alleged violation of that section.

On July 17, 1986, the parties' motion to submit this case on a stipulated record and briefs without a hearing was granted.

On September 23, 1986, after receipt of the parties' briefs, my secretary called the attorneys for the parties and asked the following question at my request:

> Please see if you can stipulate whether or not Mr. John Bushnell, at any time after notice of his Part 90 status in 1972 and before September 17, 1984, was transferred as a result of exposure to respirable dust.

The attorneys' reply is a letter from counsel for Respondent dated September 29, 1986, in which counsel states that

counsel for the Secretary stipulates to the facts stated in the letter. Accordingly, that letter is incorporated as a stipulation in the record.

FINDINGS OF FACT

The pertinent facts are set forth in stipulations submitted by the parties on July 15, 1986, and September 29, 1986. In brief, John W. Bushnell was an employee of the Respondent for approximately 17 years. Respondent was informed of Mr. Bushnell's Part 90 status in 1972. He transferred to a less dusty job in January 1980, by exercising his Part 90 rights. He remained a Part 90 miner at all times pertinent to this action. On September 16, 1984, Mr. Bushnell was employed as a dispatcher, earning $113.28 for an eight hour shift. On September 17, 1984, Mr. Bushnell was transferred from his dispatcher position to that of general inside laborer, as a result of a realignment of the Respondent's work force due to economic conditions. Mr. Bushnell's occupation code was changed from code 365 to code 116 and his pay reduced to $104.78 for an eight hour shift. Mr. Bushnell was laid off on October 1, 1984, for economic reasons. Mr. Bushnell suffered a loss of wages of $161.14 as a result of the reduction of his pay rate in connection with his transfer from dispatcher to general inside laborer. The Secretary seeks to recover $161.14 in lost pay plus interest thereon, and proposes a civil penalty in the range of $100 to $150 for Respondent's failure to maintain Mr. Bushnell's pay rate when he was transferred.

OPINION

The Secretary's regulations, at 30 CFR § 90.103, provide in pertinent part that:

> (b) Whenever a Part 90 miner is transferred, the operator shall compensate the miner at not less than the regular rate of pay received by that miner immediately before the transfer.

The regulations, at 30 CFR § 90.2, define "transfer" as "any change in the occupation code of a Part 90 miner." Thus, whenever a Part 90 miner has a change in his occupation code, the regulation require that he be paid at not less than the regular rate of pay received prior to the change.

The preamble to 30 CFR § 90.103, states that the Part 90 regulations were promulgated by the Secretary out of a concern that a large percentage of miners eligible for the Part 90 program were not participating. After receiving testimony and written comments, the Secretary attributed this lack of participation to significant economic sacrifices that

miners were forced to make on entering the program. For this reason the Part 90 rules provided eligible miners with additional economic protection, including a guarantee against reduction in pay resulting from a transfer.[1/] The Secretary's reasoning demonstrates an intent to safeguard the health of Part 90 miners, consistent with their protection provided by the Act. The regulations are therefore reasonably related to the purposes of the Act and should be sustained as valid. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973); United Mine Workers v. Kleppe, 561 F2d 1258, 1263 (7th Cir. 1977).

John Bushnell was an eligible Part 90 miner when his occupational code was changed without retention of the rate of pay he received prior to the change. Such action is contrary to the plain language of the regulation, which establishes a Part 90 miner's right to such pay retention, and constitutes interference with a protected right. It is therefore discriminatory pursuant to § 105(c)(1) of the Act, in the same manner that failure to compensate a Part 90 miner at his previous rate after a transfer to a less dusty environment would be discriminatory.[2/]

I therefore hold that John W. Bushnell was unlawfully discriminated against by Respondent for engaging in the exercise of rights protected by § 105(c)(1) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent shall pay to John W. Bushnell $161.14 in lost wages resulting from the cut in pay that occurred because of his transfer. Interest shall be added to the back pay retroactively and shall accrue until the date of payment. The interest shall be computed in accordance with the Commission's rulings concerning interest. Payment shall be made within 30 days of this Order.

1/ See 30 CFR §§ 90.12, 90.103 and 45 Fed. Reg. 80761, 80763, 80766 (1980).

2/ The rights of Part 90 miners are specifically designated for protection under § 105(c)(1) of the Act. "No person shall ... interfere with the exercise of the statutory rights of a miner ... because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 ...." 30 U.S.C. § 815(c)(1).

2. Respondent is ASSESSED a civil penalty of $25 for the violation found above, and shall pay such penalty within 30 days of the date of this Order.

William Fauver
Administrative Law Judge

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OCT 24 1986

ONY WILEY, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 86-99-D
AMOYED ENERGY COMPANY, INC., Respondent	:	PIKE CD 86-11

DECISION

ppearances: JoAnn Harvey, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Prestonsburg, Kentucky, for Complainant; James P. Pruitt, Jr., Esq., Pruitt and de Bourbon, Pikeville, Kentucky, for Respondent.

efore: Judge Melick

This case is before me upon the complaint by Tony Wiley nder section 105(c)(3) of the Federal Mine Safety and Health ct of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging hat he was discharged from Samoyed Energy Company, Inc. Samoyed) on December 31, 1985, in violation of section 05(c)(1) of the Act.1/

In order for the complainant to establish a prima facie iolation of section 105(c)(1) of the Act he must prove by a reponderance of the evidence that he engaged in an activity rotected by that section and that his discharge was motivated n any part by that protected activity. Secretary on behalf f Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), ev'd on other grounds sub nom. Consolidation Coal Company v. arshall, 663 F.2d 1211 (3d Cir. 1981). The operator may ebut the prima facie case by showing either that no protected ctivity occurred or that the adverse action was not motivated n any part by protected activity.

/ Section 105(c)(1) of the Act provides in part as follows:
No person shall discharge or in any manner discriminate gainst or cause to be discharged or cause discrimination gainst or otherwise interfere with the exercise of the statuory rights of any miner, . . . in any coal or other mine subect to this Act because such miner, . . . has filed or made a omplaint under or related to this Act, including a complaint otifying the operator or the operator's agent, . . . at the oal or other mine of an alleged danger or safety or health iolation in a coal or other mine . . . or because of the xercise by such miner, . . . on behalf of himself or others of ny statutory right afforded by this Act.

If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Donovan v. Stafford Construction Company, 732 F.2d 954 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

In this case Mr. Wiley alleges that he made periodic complaints notifying the operator's agent, Preparation Plant Supervisor Don Burgraff, of alleged dangers at its mine. In particular he alleges as protected activity the reporting of: (1) the tramming of a D-6 bulldozer on a low-boy trailer in such a way that the blade of the bulldozer obstructed his view in the rear view mirrors creating a danger in making turns without a flagman or escort; (2) the operation of the bulldozer in the refuse area during particularly muddy conditions and supporting the truck beds with the bulldozer blade to keep the trucks from turning over while dumping; (3) operating the dump trucks and bulldozer over a gas line without sufficient fill material to protect the gas line; and (4) the absence of a heat tube or other heating device in the bulldozer cab during cold weather.

With respect to the first allegation, Wiley maintains that he began complaining about those conditions in early November and then "every day" thereafter. With respect to the second allegation, Wiley maintains that he complained to Burgraff about the mud every time it rained and every evening after "it would happen." His last complaint in this regard was allegedly made to Burgraff the Friday before his discharge when Burgraff was at the refuse site as they were supporting a truck with two bulldozers. Wiley also testified that he complained "every day" to Burgraff that "something would have to be done about the gas line." Wiley maintains that he sent his complaints by way of the truck drivers to Burgraff throughout the day. With respect to the fourth allegation Wiley maintains that he complained to Burgraff "every day it was cold" about the inadequate heat in the bulldozer.

Truck driver Greg Pack worked with Wiley during relevant times. Pack confirmed that he had talked to Burgraff several

times on behalf of both Wiley and himself concerning the need for fill material to cover the gas line and about the unsafe conditions on the access road to the refuse site. He also conveyed Wiley's complaints about the lack of heat in the bulldozer and the need for a heat tube.

Burgraff acknowledged in his testimony that Wiley had complained to him about road conditions at the refuse site and, in particular, about the need for fill to cover the gas line. Wiley had also complained to him about the lack of heat on the bulldozer. Burgraff denied however that Wiley had ever complained to him about the operation of the low-boy. In the absence of corroboration of the latter alleged complaint and of Burgraff's denial (in contrast to his unqualified acknowledgement of the other complaints) that such a complaint about the operation of the low-boy was made to him I do not find sufficient evidence that the complaint was in fact communicated to Burgraff as alleged.

It is clear however that the remaining complaints by Mr. Wiley concerning allegedly dangerous conditions were communicated at some point in time to Burgraff. Wiley's testimony in this regard is corroborated in essential respects by both Greg Pack and Burgraff himself. Accordingly I find that the complainant has met the first element of a prima facie case and that indeed he was engaged in a protected reporting of alleged dangers at the mine site to an agent of the mine operator.

The Complainant also maintains that his discharge was motivated by that protected activity. In support of this causal relation he cites evidence that he made repeated safety complaints and that the reason given to him by mine management for his discharge i.e., absence without calling in, was inconsistent with what he was told was company policy.

It is not disputed that Wiley was absent from work on December 30, 1985 and that he failed to notify his employer of this anticipated absence. Wiley says that he was ill that day with arthritis and therefore went to see his doctor. When he showed up for work on December 31, he presented a doctor's excuse to Burgraff. Wiley maintains that his first supervisor at Samoyed, Frank Price, told him only that if he missed a day of work and did not call in he "had better bring in a doctor's excuse" the first day back. Price testified at hearing and fully corroborated Wiley's testimony in this regard.

Clifford Marenko, Samoyed's president testified that it was Samoyed policy that if an employee expected to be absent from work because of illness he was required to call in or have someone call on his behalf to notify the mine. Marenko admits that he never told Wiley of this policy. Marenko

testified that after Wiley failed to show up on December 30, and had not called in, he met with Don Burgraff and William Higginbotham to discuss the situtation. Greg Pack who car-pooled with Wiley was also absent that day and at the time of the meeting it was thought that he too had not called in. Pack was also therefore discharged at that meeting.

Marenko felt that Wiley's absence without calling in was "the last thing that I could tolerate". In deciding to discharge Wiley, Marenko also considered however that Wiley had previously been tardy on several occasions and had failed to obtain hard toe safety shoes. Marenko had previously warned Wiley that he could be fired for not wearing safety shoes. Marenko testified that he had discharged approximately 10 other employees over a period of 2 to 3 years for failing to call in when sick.

Don Burgraff also participated in the decision to discharge Wiley and Pack. He too believed that it was company policy to call in when sick. He decided that Wiley should be discharged based on the fact that he failed to call in sick that day, that he had not obtained safety shoes as he had been told to do, that he had been tardy on a number occasions and that there was "some question" about his work ability. Wiley's absence on December 30th was a particular problem because it necessitated the shut down of the preparation plant until a substitute bulldozer operator could be transferred to the refuse site. Burgraff denied that this discharge was the result of safety complaints.

According to Marenko and Burgraff, Greg Pack was subsequently reinstated when it was discovered that someone had in fact called the security guard on his behalf early on the morning of December 30, to advise that he would not report to work that day because of illness. When Pack was rehired he was warned by Burgraff that it was necessary for him to call in if he was sick to give advance notice.

In finding that Wiley did not suffer an unlawful discharge in this case I have considered that other employees of Samoyed (including the complainant's witnesses Greg Pack and Joe Alston) had complained of two of the three allegedly dangerous conditions that Wiley himself had complained of and suffered no apparent retaliation. I have also considered that other employees (10 or 11 employees over the previous 2 or 3 years according to the undisputed testimony of Marenko) had also been discharged for the same reason given to Wiley i.e. for failing to call in and notify the mine operator of absence because of illness. Other employees similarly situated were thus treated in the same manner as Wiley. Indeed I therefore conclude that the mine operator has rebutted the complainant's case by showing that the adverse action was not motivated in any part by the protected

activity. In any event the evidence is sufficient to show that Samoyed would have discharged Mr. Wiley for his unprotected activities alone. Haro, supra.

In reaching these conclusions I have not disregarded the evidence that Wiley had not been specifically told of the company policy requiring employees to call in when sick. Such a policy is, however, one that the ordinary working man would be expected to know without the necessity of being told. This is particularily true where the employee is working in a critical job (as was Wiley) and where his absence would cause considerable disruption of his employer's business. The credible evidence is that it is also the accepted industry practice for employees to call in when anticipating an absence due to illness.

In any event there is no evidence that the officials responsible for discharging Wiley were even aware that he had not been informed of that policy. Thus I cannot ascribe any animus from the fact that Wiley was discharged at least in part based on a policy about which he had not been specifically informed.

Under the circumstances the complaint of unlawful discharge herein must be denied and this case dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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October 24, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 86-111
	:	A. C. No. 01-01247-03713
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The parties have filed a joint motion to approve a settlement of the one violation involved in this case. The proposed settlement was the subject of conference calls on October 1 and October 7, 1986 between the Solicitor, operator's attorney, and the Judge. At the conference calls the violation was discussed at length. The originally assessed penalty for this violation was $725. The proposed settlement is for $200.

The joint motion discusses the violation in light of the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Citation No. 2192194 was issued for violation of 30 C.F.R. § 70.100 because an excessive concentration of coal dust was detected in the operator's mine. The parties represent that the violation was much less serious than was originally thought because all exposed miners were adequately protected by respirators. A reduction in the penalty below $200 is not justified, however, because the operator failed to abate the violation in as timely a manner as could have been expected.

The representations and recommendations of the parties are accepted.

Accordingly, the motion to approve settlement is GRANTED and operator is ORDERED TO PAY $200 within 30 days of the date of decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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OCT 31 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 86-86-M
	:	A.C. No. 42-01927-05502 15J
v.	:	Gilbert Mine #1
SANDERS CONSTRUCTION, INC., Respondent	:	

DECISION

Appearances: Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner.

Before: Judge Morris

This is a civil penalty proceeding initiated by petitioner against respondent in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil penalties sought here are for the violation of mandatory standards promulgated pursuant to the Act.

After notice to the parties, a hearing on the merits commenced in Las Vegas, Nevada on August 26, 1986. At the hearing counsel for the petitioner advised the judge that the parties had reached an amicable settlement.

The citations, the standards alleged violated, the original assessments and the proposed dispositions are as follows:

Citation No.	Standard C.F.R. Title 30	Original Assessment	Disposition
2361156	56.6047	$500	$500
2361157	56.6047	500	500
2361159	56.6090	500	500
2361171	56.6047	500	500
2361175	56.18020	500	Vacate

I have considered the proposed settlement and I find it is reasonable and in the public interest.

Accordingly, I enter the following:

ORDER

1. The settlement is approved.

2. The following citations and proposed penalties are affirmed:

Citation No.	Penalty
2361156	$500
2361157	500
2361159	500
2361171	500

3. Citation 2361175 and all penalties therefor are vacated.

4. Respondent is ordered to pay the sum of $2,000 within 45 days of the date of this decision.

John J. Morris
Administrative Law Judge

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* U.S. GOVERNMENT PRINTING OFFICE 1986; 491-223/53108